92-217

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN COUNCIL OF THE BLIND OF COLORADO, INC., a Colorado non-profit corporation; ROCKY MOUNTAIN FEDERATION OF HANDICAPPED ATHLETES, a division of Pegasus Foundation, Inc., a Colorado non-profit corporation,

Petitioners,

v.

ROY ROMER, Governor, State of Colorado; DUANE WOODARD, Attorney General, State of Colorado; NORM S. EARLY, JR., District Attorney for the Second Judicial District, State of Colorado,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff is a "prevailing party" for purposes of an award of attorney's fees under 42 U.S.C. § 1988 when the action is mooted by the enactment of amendments that repeal or modify each of the specific statutory provisions challenged.

2. Whether a plaintiff that achieves relief through statutory amendment must, in order to qualify as a "prevailing party," bear the burden of establishing the motivation of the legislature in enacting the amendments.

3. Whether a plaintiff that obtains temporary relief that allows it to engage in its activities free of the burdens of the challenged statutory scheme is a "prevailing party."

PARTIES TO THE PROCEEDING AND RULE 29.1 LIST

There were no parties to the proceeding in the court whose judgment is sought to be reviewed that do not appear in the caption. The petitioners are a nonprofit corporation and a division of a nonprofit corporation, and have no parent companies or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

The American Council of the Blind of Colorado, Inc., a Colorado non-profit corporation, and the Rocky Mountain Federation of Handicapped Athletes, a division of Pegasus Foundation, Inc., a Colorado non-profit corporation, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 962 F.2d 1501 (10th Cir. 1992), and is set forth at App. 1a.[1] The recommendation of the United States Magistrate is unreported, and is set forth at App. 16a. The district court's orders denying plaintiffs' motion for attorney's fees and denying reconsideration are unreported, and are set forth at App. 37a and App. 39a, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 5, 1992. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1988 provides, in pertinent part, as follows:

> In any action or proceeding to enforce a provisions of sections 1981, 1981a 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The relevant portions of Colo. Rev. Stats. §§ 6-16-101 through 6-16-113, as they stood at the time the action was filed, and of their amendments enacted while the action was pending, are set forth at App. 40a and App. 44a, respectively.

STATEMENT OF THE CASE

This action under 42 U.S.C. § 1983, commenced on June 29, 1988, by plaintiffs and petitioners American Council of the Blind of Colorado, Inc., and Rocky Mountain

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[1] Citations to "App." refer to the appendix to this petition.

Federation of Handicapped Athletes, Inc., presented a First Amendment challenge to the then-newly enacted Colorado Charitable Solicitations Act, former Colo. Rev. Stats. §§ 6-16-101 through 6-16-113 and 18-7-103, governing charitable solicitations within Colorado.[2] The district court had jurisdiction over the action pursuant to 28 U.S.C. §§ 1331, 1343(3).

The plaintiffs—both of which are Colorado charitable organizations that retain the services of professional fundraisers to seek donations, to disseminate information, and to solicit new members—had at the date of filing ongoing and planned charitable solicitations campaigns. The statute was to become effective on July 1, 1988, two days after the action was filed. At the same time the complaint was filed, plaintiffs applied for a temporary restraining order and a preliminary injunction. *See* Applt. App. 8, 11.[3] The state defendants agreed not to enforce the Act pending resolution of the injunction.

The American Council of the Blind of Colorado works to dispel the myths surrounding blindness and to open lines of communication between the blind and sighted. To that end, the Council provides information and referral services, support networks and counseling, public awareness services, lectures, grants or scholarships to visually impaired students, and information regarding pending legislation. Applt. App. 9.

The purpose of the Rocky Mountain Federation of Handicapped Athletes is to educate, coach, train and motivate people with disabilities to engage in competitive and non-competitive athletics. The Federation works with the blind, the hearing-impaired, wheelchair athletes, people with cerebral palsy or spinal cord injuries, and others. It depends on its fundraising campaigns not only to sup-

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[2] The statute as challenged is set out at App. 40a.

[3] "Applt. App." refers to the Appellants' Appendix filed by plaintiffs in the court of appeals.

port its programs, but to inform the public about its goals and activities. Applt. App. 12. At the time the complaint was filed, the Federation was engaged in an informational and fundraising campaign being conducted by Vantage Productions, Inc.

Both the Federation and the Council are dependent for funding upon contributions from members of the public. Neither has an in-house fundraising staff, and they must rely on the services of outside professional fundraising and consulting companies to raise funds and to disseminate their messages. Applt. App. 9, 12.

The action challenged the Colorado statute on its face. It proceeded on two interrelated levels.

First, the plaintiffs alleged that, because of the extraordinary burdens the Act placed on organizations that engaged outside fundraisers, it unconstitutionally discriminated against new, small, and unpopular groups that depend on outside fundraisers for their support and in favor of better established organizations that employ their own fundraising staff. Applt. App. 102-103. Second, the plaintiffs detailed eight *specific* sections of the statute that they alleged "impose[d] burdens on speech that are not closely fitted to any significant or compelling state interest." Applt. App. 103-104.

The state defendants moved to dismiss. Applt. App. 107, 145. They also opposed the motion for preliminary injunction, arguing that the statute was constitutional. Applt. App. 114.

Before the hearing of the motions, the parties stipulated and the district court ordered that, if the motions to dismiss were denied, the defendants would not enforce the statute, except for a few sections, "against either of the named plaintiffs or against any other fundraising similar to those of plaintiffs' campaigns on behalf of other organizations and conducted by Vantage Productions, Inc." Applt. App. 152.

The motions to dismiss were heard on August 26, 1988, along with motions in two other cases challenging various aspects of the statute that had been filed after this case,[4] and were denied in principal part on August 31, 1988, Applt. App. 154. Because the action had not been dismissed, the stipulation took effect, and enforcement of the statute remained stayed.

The defendants remaining in the case answered, denying that the statute was unconstitutional. The parties stipulated to a schedule of discovery and other matters, "believ[ing] that the Court may be able to resolve part [sic] or all of the issues in this case by ruling on Motions for Summary Judgment." Applt. App. 179.

The court set dates for a status conference and trial, Aplt. App. 186, but about two weeks later, the parties stipulated to vacate the dates, Applt. App. 194. The stipulation recited that counsel for the parties had met on November 2, 1988. At the meeting, "all counsel agreed to a postponement of any further litigation in this matter to attempt to resolve issues through legislation," and the attorney general and the district attorney "sought . . . and will continue to seek to learn the concerns of the plaintiffs and to get the input of counsel for Plaintiffs in redrafting certain portions of the statute." The stipulation also noted that "[a]ll parties believe that revisions of the statute, depending on their content, may resolve all of the issues in this case and render any further litigation unnecessary." It pointed out that the district attorney had already "reserved a bill title and obtained a sponsor for a bill in the next session of the Colorado legislature to revise the Colorado Charitable Solicitations Act." The defendants' agreement not to enforce the statute pending resolution of the action remained in effect.

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[4] *Fraternal Order of Police, Lodge #1 v. Woodard*, No. 88-Z-1010 (D. Colo. filed June 29, 1988); *Qiviut, Inc. v. Meyer*, No. 88-Z-1331 (D. Colo. filed Aug. 19, 1988).

The stipulation was carried out. On June 6, 1989, the Governor signed into law Senate Bill 32, amending the statute at issue.[5] The amendments either repealed or otherwise modified each of the specific provisions of the statute that the plaintiffs had challenged.

The action having been thus resolved through legislation, the plaintiffs moved for an award of attorney's fees under 42 U.S.C. § 1988. Applt. App. 358. The court referred the matter to Magistrate Donald E. Abram for hearing and recommendation. Applt. App. 313.

The magistrate recommended that the motion be denied. App. 16a. He concluded first, that "the plaintiffs were not prevailing parties for purpose of attorneys' fees under any of the existing tests." App. 25a. Second, he found that attorney's fees should not be awarded because "counsel represented a nonparty, Vantage and North American." App. 30a. (Vantage, a wholly-owned subsidiary of North American Marketing Group, paid the plaintiffs' attorney's fees.) Finally, although it was not clear how it bore upon the ultimate recommendation, and although most of the issues involved had not previously been raised, the magistrate also believed that plaintiffs' counsel violated or "possibl[y]" violated certain rules of professional conduct. App. 30a, 34a.

Plaintiffs objected to the recommendation. Applt. App. 375. The district court, however, "accept[ed] and adopt[ed] the Magistrate's findings and recommendation." App. 38a. Plaintiffs moved for reconsideration. The court denied the motion, but also ordered "that this Court takes no position nor expresses any opinion as to the ethical conduct of plaintiffs' attorneys, since the Magistrate's comments on that subject were not necessary to this Court's order denying attorney's fees." App. 39a. The result was that the court adopted the magistrate's recommendation as to the prevailing-party and party-representation issues, but disassociated itself from the

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[5] The amending statute is set out at App. 44a.

recommendation's remarks, and made no finding, as to the ethics issues.

The court of appeals affirmed. It explained, first, that "the district court committed error in its determination that the Plaintiffs were not entitled to fees because the litigation was financed by a third party." App. 5a, 962 F.2d at 1504. It "nonetheless affirm[ed] the district court's denial of fees . . . on the separate issue of prevailing party." *Id.*

The court was "in agreement with the district court that the large majority of the changes should be deemed technical or *di* [sic] *minimus* [sic]." App. 10a, 962 F.2d at 1506. As to "[t]he one section in which the change could be viewed as having some significance," the court held that the repeal "was directly caused and mandated by the *Riley* case," referring to *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). App. 12a, 962 F.2d at 1507.

REASONS FOR GRANTING THE WRIT

I. SUCCESS FOR PURPOSES OF DETERMINING WHETHER PLAINTIFFS HAVE PREVAILED UNDER 42 U.S.C. § 1988 SHOULD BE MEASURED BY THE RELIEF REQUESTED AND, AS A PRACTICAL MATTER, ACHIEVED.

In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989) the Court adopted a " 'generous formulation' " for determining whether a plaintiff in 42 U.S.C. § 1983 suit is a "prevailing party" eligible for an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. *Id.* at 792. "If the plaintiff has succeeded on 'any significant issue in litigation which achieved[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind." *Id.* at 791-92 (brackets in the

original) (quoting *Nadeau v. Helgemoe*, 585 F.2d 275, 278-79 (1st Cir. 1978)).

Carved out from the rule were cases in which "the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis* . . . ." Id. at 792. This exception, while necessary, is narrow, and if interpreted overbroadly would undermine the foundation of the *Garland* principle.

This case concretely poses the danger. The magistrate stated that the statutory changes were de minimis, App. 21a, but did so without analysis, and in the context of a misunderstanding of both plaintiffs' case and of this Court's holding in *Garland*. The district court's approval was summary. *See* App. 38a, 39a. In their appellate brief, the respondents quoted the magistrate's de minimis conclusion, but did not otherwise defend it. The court of appeals nevertheless plucked out the issue and made it the centerpiece for its conclusion that plaintiffs had not prevailed.

Plaintiffs, however, succeeded on each of the specific claims they had made in the complaint, and, taken together, these achievements narrowed the gap of unequal protection of which the complaint also spoke. As another circuit has recognized, "once they had achieved that measure of success, the plaintiffs were free to decide they had achieved sufficient relief. A plaintiff is, after all, the master of his or her suit." *Crowder v. Housing Auth.*, 908 F.2d 843, 849 (11th Cir. 1990).

The court below here, however, under the rubric of the de minimis proviso to the *Garland* rule, disregarded these considerations and engaged in an acontextual parsing of the statutory amendments to conclude that "the changes in the Act did not significantly alter the state regulation of and requirements placed on a paid solicitor in Colorado." App. 10a, 962 F.2d at 1506.

The court's particular analysis was flawed, but, more importantly, its decision illustrates the problems inherent

in the entirely open-textured de minimis rule the court apparently perceived to exist. Certiorari should be granted to clarify the narrowness of the exception to *Garland*'s "generous formulation."

This Court is presently considering the scope of the de minimis exception in another case. In *Estate of Farrar v. Cain*, 941 F.2d 1311 (5th Cir. 1991), *cert. granted sub nom. Farrar v. Hobby*, 60 U.S.L.W. 3578 (U.S. Feb. 24, 1992) (No. 91-990), the Fifth Circuit—recognizing that its decision "conflict[ed] with opinions of the second, seventh, eighth, ninth, tenth, and eleventh circuits," 941 F.2d at 1316 (footnote omitted)—held that an award of nominal damages in a money-damages case is "merely a *de minimis* or technical success," 941 F.2d at 1316 (footnote omitted). Other courts have held to the contrary that a finding of constitutional violation, albeit one that simultaneously rejects compensatory damages, " 'changes the legal relationship' " between the parties. *Ruggiero v. Krzeminski*, 924 F.2d 558, 546 (2d Cir. 1991) (quoting *Garland*, 489 U.S. at 792). The stuff the *Garland* touchstone is made of is at issue both in this case and in *Farrar*.

Unlike *Farrar*, however, this case was not tried to judgment, but was terminated as moot after the challenged statute underwent substantial amendment under pressure of this litigation. Plaintiffs here prevailed through a different route than in *Farrar*, but one that does not affect their status for section 1988 purposes.

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through judgment —*e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Hewitt v. Helms, 482 U.S 755, 760-61 (1987).

That is, prevailing by settlement or other means short of judgment "does not weaken [a plaintiff's] claim to fees." *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *accord*, *Smith v. Robinson*, 468 U.S. 992, 1006 (1984). The approach adopted by the court of appeals in this case would tend to discourage the settlement of cases and encourage plaintiffs to litigate beyond the point that satisfies their own goals solely to preserve their claim to an award or attorney's fees.

In cases of this kind, the courts should be cautious to second-guess a plaintiff's decision that the relief granted is substantial enough for it to deem a case moot. A party that has instituted litigation is unlikely voluntarily to call it to a halt unless a meaningful change in circumstances has occurred. That is not to say, of course, that the plaintiff's choice is unreviewable, but only that it deserves a degree of deference.

Here, not only did the behavior of the plaintiffs indicate that the statutory change was greater than de minimis, but that of the defendants did as well. The sweeping amendments enacted by the Legislature cannot reasonably be regarded as a "'[n]uisance settlement[]'" that does not "'give rise to a 'prevailing' plaintiff." *Garland*, 489 U.S. at 792.

Following the meeting between counsel for the parties, the proposed new statute was drafted by Deputy District Attorney Neal A. Richardson, the draftsman of the challenged statute and counsel in the district court for the defendant District Attorney Early. Senator Dorothy Wham became the sponsor of the bill in the legislature, and introduced Mr. Richardson to present it to the senate committee.

Mr. Richardson began by noting that, because of section 1988, "the bill the State is going to have to pay for those people litigating the charitable solicitations question we hear is about $90,000." Applt. App. 456. He continued:

> So, you know, the problem with this lawsuit is that it has cast a pall of the economic burden on the agencies litigating it. *And so we've decided that instead of litigating on these provisions that have been severely called into question* by these Court decisions . . . with a high chance of losing this litigation, instead ask the legislature, *and Senator Wham has proposed some amendments to prune this Statute down and eliminate a lot of the issues in this lawsuit*, get a Statute that is enforceable, that will not be under a cloud, and that we can go out and enforce.

Applt. App. 456-57 (emphasis added).

Mr. Richardson continued to discuss the lawsuits and their contentions. *See, e.g.*, Applt. App. 460 ("[A]ll of the charitable groups involved in the lawsuit subscribed to . . . making clear that the contributor has a right to rescind their donation . . . [T]hat is something that all the parties were able to agree on to go into the Statute."); *id.* ("[W]e took out a prohibition on runners going out to pick up these donations, which the charities claimed would interfere with follow-up visits and further communications with the contributor and was not something the Supreme Court said you could do."). He later transmitted the draft statute to counsel for plaintiffs stating, "I believe that this draft addresses most, if not all, of the concerns of your clients." Applt. App. 438.

There is, based on this history, little doubt that the defendants themselves considered the amendment more than a de minimis. Examination, in context, of the changes themselves should have led the court below to the same result.

The action challenged the Colorado statute in two related ways. It alleged, first, that by imposing lesser burdens on charitable organizations that use their own members or employees to raise funds than on those that engage professional fundraisers, the statute violated the First Amendment and its Equal Protection component. *See* Applt. App. 102. Second, the plaintiffs alleged that

enumerated provisions of the Act violated the First Amendment because they were not "closely fitted to any significant or compelling state interest." *Id.* The complaint set out the challenged provisions specifically and extensively. *See* Applt. App. 102-104. The amendments to the statute substantially modified each provision, as summarized below.

In dismissing the changes, the court erred as a matter of law in three significant ways. First, as noted in Item 1 below, the court simply overlooked one important change in the statute. Second, the court viewed the changes from an abstract plane of statutory language. The purpose of litigation is, however, to achieve practical, real-world results for a plaintiff, not to score technical legal points. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987). Section 1988 success should be measured from that baseline as well. Third, despite the court's disclaimers to the contrary, its analysis is important based on the conclusion that the changes did not "address the Appellants' equal protection concerns which were the primary thrust of the Appellants' lawsuit to effect repeal of the entire statute." App. 14a, 962 F.2d at 1508. In so doing, the court fell into the same error as had the magistrate, in effect assuming that a plaintiff must "succeed on the 'central issue in the litigation' and achieve the 'primary relief sought' "—a notion this Court has expressly disapproved, *Garland*, 489 U.S. at 787.

1. *Notice and reporting.*

The complaint alleged that section 6-16-104(1), which required that certain information be filed with the secretary of state, was "not sufficiently precise to advise a solicitor or organization about what is required to comply." Applt. App. 102. The amendment replaced the requirement of a "full and fair description" of the nature of the campaign and the program with that of a "statement, not in violation of section 6-1-111(1)(f) or (1)(g)," concerning deliberate misrepresentations or fraud. The

hazy language subject to administrative discretion and interpretation was forgone in favor of language with a defined legal meaning.

This change in and of itself was more than enough to bring the case across the *Garland* threshold. Because the statute did not "sufficiently specify what those within its reach must do in order to comply," it gave the state "the *effective* power to grant or deny permission to canvass." *See Hynes v. Mayor of Oradell*, 425 U.S. 610, 621, 622 (1976) (emphasis in the original).

Although the amendment directly cured a substantial alleged constitutional violation, the court of appeals did not even mention it, much less explain why it was de minimis. For this reason alone, the judgment below does not comport with the *Garland* standard.

2. *Preparation of report.*

The complaint challenged section 6-16-104(5), which required organizations retaining paid solicitors to prepare a financial report within sixty days after a campaign. Applt. App. 103. The amendment to the statute extended the time to ninety days. The allowance of fifty percent more time was plainly a substantial change mollifying the earlier provision.

Of this, the court of appeals simply said, without elaboration, that it was "of the opinion that such a change is insignificant." App. 11a, 962 F.2d at 1506. Here, the court used some unstated standard that did not treat the change, as it properly should have been treated, from the point of view of those subject to the statute. Thirty days more to prepare and file a potentially complex financial report is not from that viewpoint de minimis, even though someone not faced with the necessity of filing such a report might think otherwise.

3. *Local record keeping.*

The complaint challenged section 6-16-104(5), which required that all records for a campaign be maintained

in Colorado at the solicitor's principal place of business. Applt. App. 103. It noted that professional solicitors, and Vantage in particular, are out-of-state companies. *Id.* The provision was repealed.

The court of appeals stated that, while the repeal "may have been of some benefit to the Appellants, such benefit was merely technical and could hardly be deemed significant in light of the asserted primary purpose of the Appellants' lawsuit, which was to cause repeal of the statute on equal protection grounds." App. 11a, 962 F.2d at 1506.

The reasoning is flawed in at least two serious respects. First, by dismissing the local-record-keeping repeal as "merely technical," the court ignored the evident practical benefit achieved by the avoidance of the burden the statute placed on out-of-state companies. Second, by judging the outcome in terms of the "the asserted primary purpose of Appellants' lawsuit," it, as had the magistrate, employed the "central issue" test *Garland* repudiated.

4. *In-person collection.*

The compiaint challenged section 6-16-106(1), which forbade a monetary contribution solicited by telephone to be collected in person. Applt. App. 103. The plaintiffs alleged the provision "would substantially reduce the percentage of pledges actually collected, and vastly increase the cost of collecting donations." *Id.* It was also characterized as "a direct and substantial burden on the ability of plaintiffs to deliver information about their activities directly to their donors." *Id.*

The provision was repealed.

Again, the court below was "simply not persuaded that such a change is significant in light of Appellants' equal protection argument, and is nothing more than *di* [sic] *minimus* [sic]." App. 11a, 962 F.2d at 1506.

The response once more judges the change from a technical, rather than a practical, point of view, effacing plaintiffs' success in eliminating a substantial burden on

their charitable solicitations campaign. And it again applies the discredited "central issue" test.

5. *Confirmation and disclosures.*

The complaint alleged that section 6-16-105 "requires that a paid solicitor disclose, in writing, considerable information that is, to a large extent, uncertain at the time the disclosure is required." Applt. App. 103. The statute was rewritten. There is no longer a requirement that the individual solicitor, but now only his employer, be identified in the written confirmation. Moreover, the lengthy, specifically worded, boldface warning previously required was eliminated. Now there need only be a simple identification of the solicitor's paid status. The old warning included a notice of the right to obtain data on expenses. The new section does not require either the advice that such information must be furnished or the specifics about how that information is to be requested.

On this point the court acknowledged that "the change could be viewed as having some significance." App. 12a, 962 F.2d at 1507. It decided, however, that the lawsuit was not the cause of the change, a matter dealt with in section II, *infra*.

6. *Donated tickets and sponsored attendance.*

The complaint challenged section 6-16-107, requiring advance agreement by organizations to receive tickets on a donated basis, and limiting the donation of tickets to the number of people already committed to attend a show. Applt. App. 103. It was substantially altered by the amendment. The new law requires only that a solicitor not represent that tickets will be given to another organization if the solicitor knows or believes that they will not be "used or received by the donees or beneficiaries in the quantity represented." Thus, as long as the tickets are actually sent to the recipient organization, the provision is satisfied.

The court of appeals stated that the amendment "does not change the ultimate thrust of the statute." App. 12a, 962 F.2d at 1507. The observation appears to mean that the amended statute fulfilled the same or similar *state* interests as did the challenged provision. But that misses the point, for the amendment self-evidently lifted considerable burdens for the *plaintiffs*—making advance arrangements with organizations and keeping strict track of the people for whom these third parties are using tickets. If, as the state evidently concluded, its own interests could be protected in substantially less restrictive ways, the result must be counted as a victory for the plaintiffs.

7. *Maintenance of records.*

The complaint challenged section 6-16-109, requiring paid solicitors to maintain certain records for three years. Applt. App. 103. The amendment reduced the time by a third, to two years.

The court decided that this "change was of only limited benefit to the Appellants." App. 12a, 962 F.2d at 1507. Apart from the fact that *any* benefit achieved in litigation is necessarily "limited," it is the regulated parties who are responsible for keeping records, and from their point of view, the reduction in time achieved by the amendment is not de minimis.

In sum, each and every substantive provision of the Colorado statute that the plaintiffs attacked was either repealed or substantially changed in the plaintiffs' favor. The Legislature's paragraph-by-paragraph response to the specific issues raised by the complaint is a paradigm case of a "material alteration of the legal relationship of the parties." *Garland*, 489 U.S. at 792-93.

Indeed, when the results of the lawsuit are viewed realistically rather than formalistically, plaintiffs are seen, contrary to the court's view, to have significantly prevailed on the "Equal Protection" issue as well. Each

change made in the statute brought the status of charities with outside solicitors closer to that of charities with in-house solicitors. The accretions made by the individual gains add up to important progress on the differential-treatment problem as a whole.

II. WHEN AN ACTION FOR INJUNCTIVE RELIEF IS MOOT BY STATUTORY AMENDMENT, THE PLAINTIFF OUGHT NOT BEAR THE BURDEN IN THE FIRST INSTANCE OF PROVING LEGISLATIVE MOTIVATION IN ORDER TO QUALIFY FOR A FEE AWARD.

It is common ground that in order for a plaintiff in a mooted case to qualify as a prevailing party under section 1988, the lawsuit must contribute in some way to the relief obtained. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987). Moreover, as the Tenth Circuit has elsewhere held, "[t]he plaintiff's suit need not have been the sole reason for the defendants' actions; it is enough that plaintiff's actions were a significant catalyst or a substantial factor in causing defendants to act." *Luethje v. Peavine School Dist.*, 872 F.2d 352, 354 (10th Cir. 1989).

Controversy arises, however, on the questions of where the burden lies on the issue of causation. Some courts, evidently including the court below, place the burden entirely on the plaintiff. *See, e.g., American Constitutional Party v. Munro*, 650 F.2d 184, 188 (9th Cir. 1981). Others hold that, where "plaintiffs' lawsuit is mooted by defendants' corrective action, the burden properly shifts to defendants to establish the absence of a causal connection in order to defeat a claim for fees." *Koppel v. Wien*, 743 F.2d 129, 135 (2d Cir. 1984) (action to block amendment to real estate agreement); *see also Crooker v. United States Dep't of Justice*, 632 F.2d 916, 919 (1st Cir. 1980) (FOIA action) ("[F]aced with a colorable claim of cause-and-effect, the government has not demonstrated that the complainant's success in obtaining the requested documents was due more to its responsible com-

pliance with the provisions of the Act than to the complainant's pending suit.").

The burden-shifting principle of cases like *Koppel* and *Crooker* is, plaintiffs believe, the rule of decision more consonant with the purposes of statutory fee provisions in favor of "prevailing parties." Causation in these cases turns on the defendant's motivation. A defendant may often be able to block a fee award by merely averring that its actions were not caused by the lawsuit, and, in any event, the nature of a defendant's motivation is a fact that a plaintiff would not ordinarily be expected to have access to. "The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *United States v. New York, N.H. & H. R.R.*, 355 U.S. 253, 256 n.5 (1957).

The location of the burden of showing causation in mooted cases, is an important question to the administration of section 1988 and other fee-shifting statutes generally. It is of particular significance in a case like this one, in where the mooting event was legislative action. Legislative "motivation" is notoriously difficult to assign and decipher in any event, whether the question is, say, the interpretation of a statute, or the resolution of a claim of discrimination. Determining why a legislature passed a statute, for purposes of deciding whether a plaintiff is entitled to a fee, is no easier a problem. To require the plaintiff to prove the motivation in the first instance, moreover, cuts sharply against the policy that "[a] request for attorney' fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

In this case, despite extensive evidence on several levels that the plaintiffs' lawsuit substantially contributed to the mooting amendments enacted by the Colorado legislature, the magistrate concluded that "the plaintiffs' attorneys' efforts were not the moving force behind the changes of the legislation," App. 23a, and the court of

appeals affirmed the result as not "clearly erroneous," App. 15a, 962 F.2d at 1508.

The plaintiffs certainly met any conceivable requirement of a colorable or prima facie case. The burden should have been on the defendants as a matter of law to show that the enactment of the amendments was not influenced by the lawsuit.

As noted above, the court of appeals held that the change in section 6-16-105, which it incorrectly viewed as "the only significant change in the Colorado statute," App. 13a, 962 F.2d at 1507, "was directly caused and mandated by the *Riley* case [*Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988)], which was pending in the United States Supreme Court before the original Act was passed and before Plaintiffs' lawsuit," App. 12a, 962 F.2d at 1507.

The court's premise is flawed. All, or almost all, successful lawsuits are fueled by supporting case law. That does not mean that the abstract existence of cases on the books is what makes the suit a success. The pronouncements of courts must be given concrete embodiment in litigation for results on the ground to be achieved. The results here were unquestionably achieved "under the pressure of the lawsuit." *See Hewitt v. Helms*, 482 U.S. 755, 761 (1987). "The courts are in agreement that a § 1988 fees award is proper when the defendant 'voluntarily' complies under threat of the lawsuit, for such compliance, although mooting the lawsuit, shows acquiescence in the plaintiff's position." *Kay v. David Douglas School Dist. No. 40*, 484 U.S. 1032, 1033 (White J., dissenting from denial of certiorari). The decision below is inconsistent with this principle.

In any event, the relevant record of this case, most of which was overlooked by the district court, establishes as much.

First, the defendants effectively conceded that, in their contemporaneous view, *Riley* did not render the Colorado

statute unconstitutional. This action was filed on June 29, 1988, two days before the challenged statute was scheduled to take effect. By happenstance, *Riley* was decided the same day.

Three weeks after *Riley*, the attorney general filed a fourteen-page document opposing the preliminary injunction, overwhelmingly devoted to the proposition that "THE PLAINTIFFS WILL LIKELY FAIL ON THE MERITS." Applt. App. 115 (capitalization in the original); *see* Applt. App. 115-27. The attorney general mentioned *Riley* four times, *see* Applt. App. 119, 121, 122, 124, at no point indicating that *Riley* cast any doubt on the constitutionality of the challenged statute. In September, the defendants answered the first amended complaint, denying all allegations of unconstitutionality. Applt. App. 159, 163.

All of these papers were, of course, filed "after reasonable inquiry" that their contents were "well-grounded in fact and . . . warranted by existing law on a good faith argument for the extension, modification, or reversal of existing law." Fed. R. Civ. P. 11. Thus, almost three months after *Riley*, the defendants recorded their good faith belief that the validity of the statute was unaffected by that decision.

Even if it is assumed, after this, that "*Riley* was the catalyst for this change in the Colorado statute," App. 13a, 962 F.2d at 1507, at the very least the lawsuit contributed to the timing of the change, given that for months the defendants insisted that *Riley* had no effect whatsoever on the statute. That achievement alone is enough to credit the lawsuit as a factor in the result. The court below implicitly acknowledged, moreover, that *Riley* did *not* control the result with regard to section 6-16-105, stating that there were some generic similarities between it and the North Carolina statute invalidated in *Riley*. *See* App. 13a, 962 F.2d at 1507. If *Riley* was not the only factor, it follows almost by definition that the lawsuit was one as well.

The course of litigation demonstrates the same conclusion. After suit was initiated, the defendants did not lie supine. They filed a motion to dismiss. They filed a plenary opposition to the motion for a preliminary injunction and submitted answers, all contending that the challenged statute was constitutional. They initiated discovery. Only then did defendants suggest that the case be disposed of by amending the challenged statute. *See* Applt. App. 195-96. The agreement of the defendants "to resolve issues through legislation," *id.*, tied the litigation to the fate of the statute it challenged.

The court quoted one snippet of the legislative history in which the amending bill's sponsor, Sen. Wham, evidently referred to *Riley*. *See* App. 13a, 962 F.2d at 1507. As noted, however, *Riley* cannot supply the full answer. In any event, the court did not refer to Sen. Wham's acknowledgement that the statute "has not gone into effect because a lawsuit was filed," Applt. App. 453, or to the statement of the bill's draftsman, quoted above, that the bill was intended to "eliminate a lot of issues in this lawsuit" which the state otherwise stood a "high chance of losing," Applt. App. 456-57.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 3, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-1365

AMERICAN COUNCIL OF THE BLIND OF COLORADO, INC., a Colorado non-profit corporation; ROCKY MOUNTAIN FEDERATION OF HANDICAPPED ATHLETES, a Division of Pegasus Foundation, Inc., a Colorado non-profit corporation,

Plaintiffs-Appellants,

v.

ROY ROMER, Governor, State of Colorado; DUANE WOODARD, Attorney General, State of Colorado; NORMAN S. EARLY, JR., District Attorney for the Second Judicial District, State of Colorado,

Defendants-Appellees.

Filed May 5, 1992

Robert C. Moest of Fleishman, Fisher & Moest, Los Angeles, Cal. (Barry A. Fisher, Los Angeles, Cal., and Edwin S. Kahn, Denver, Colo., with him on the brief), for plaintiffs-appellants.

Nathan B. Coats, Chief Appellate Deputy Dist. Atty., Denver District Attorney's Office (Larry Tannenbaum, Asst. Atty. Gen., Colorado Atty. General's Office, with him on the brief), Denver, Colo., for defendants-appellees.

Before LOGAN and BRORBY, Circuit Judges, and DAUGHERTY, District Judge.*

DAUGHERTY, District Judge.*

The Plaintiffs-Appellants appeal from a denial of their Motion for Attorneys Fees pursuant to 42 U.S.C. § 1988. The Appellants had filed suit under 42 U.S.C. § 1983 in June, 1988, challenging the constitutionality of the Colorado Charitable Solicitations Act, which has become effective on July 1, 1988. In that suit, the Plaintiffs alleged that the Act unconstitutionally discriminated against new, small and unpopular groups that depended on outside fundraisers for their support because of the unique and extraordinary burdens the Act placed on organizations that engaged those outside fundraisers. The Plaintiffs also asserted that certain specific sections of the statute imposed impermissible burdens on speech that were not closely tied to any significant or compelling state interest.

At a hearing on August 26, 1988, the Plaintiffs' lawsuit was consolidated with two other lawsuits also challenging the Charitable Solicitations Act, and all of the Defendants except the Governor of Colorado, the Attorney General of Colorado and the Denver District Attorney were dismissed. The Plaintiffs had previously filed Motions for a preliminary injunction, and those Motions were withdrawn on the above date because the Defendants agreed not to enforce most of the provisions of the new Act until the challenges to the Act could be resolved. On November 21, 1988, the parties entered into a stipulation to vacate all dates that had been set by the trial court in an attempt to resolve the litigation by legislative amendment. On June 6, 1989, the legislative amendments were signed into law.

The Plaintiffs then moved for attorneys fees in the amount of $80,000.00 under the Civil Rights Attorneys

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* Honorable Fred Daugherty, Senior United States District Judge for the Western District of Oklahoma, sitting by designation.

Fees Award Act of 1976, 42 U.S.C. § 1988.[1] The Motion for Attorneys Fees was referred by the Court to a magistrate for hearing and recommendation. After a hearing the magistrate concluded and recommended that the Plaintiffs were not prevailing parties under the relevant case law and therefore were not entitled to any award of attorneys fees. In addition, the magistrate concluded and recommended that the attorneys fees should not be awarded because "counsel represented a non-party [sic], Vantage and North American." Recommendation of United States Magistrate, at 11. The magistrate also stated that he was of the opinion that Plaintiffs' counsel possibly violated several rules of professional conduct. The magistrate's findings and recommendations were accepted and adopted by the district court in November, 1990, except as to the finding of any professional conduct violation on the part of Plaintiffs' counsel.

The only issue on appeal in this case is whether the district court erred in denying Plaintiffs' Motion for an award of attorneys fees under 42 U.S.C. § 1988. The Appellants frame the sub-issues as follows: (1) whether Plaintiffs were the prevailing parties in the litigation, and (2) whether a denial of fees was justified because the Plaintiffs' fees were paid by a third party.

The standard of review to be applied in this case is that questions of law are reviewed *de novo*, while questions of fact may be disturbed on appeal only if found to be clearly erroneous. *Post Office v. Portec, Inc.*, 913 F.2d 802 (10th Cir.1990). In applying the above principles to an attorneys fee case under 42 U.S.C. § 1988, this Court has stated that if the issue of prevailing party turns on whether the Plaintiff's lawsuit is causally linked to the

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[1] 42 U.S.C. § 1988 states in pertinent part:

"In any action or proceeding to enforce a provision of § 1981, 1982, 1983 and 1986 of this title . . . the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorneys fee as part of the costs."

relief obtained, that is, whether the suit is a substantial factor or significant catalyst in prompting the change, that is a factual issue to which the clearly erroneous standard of review should be applied. The second prong of the analysis, whether the change that resulted was actually required by law, is a legal issue which this Court should examine *de novo*. *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir.1986).

This Court will first discuss the Appellants' contention that the district judge was incorrect in holding that the Appellants were not entitled to fees because those fees were paid by a third party. The magistrate's recommendation used the fact that the Plaintiffs' fees were paid by a third party as a separate and independent basis upon which to deny Plaintiffs their fees under 42 U.S.C. § 1988, regardless of whether Plaintiffs would have been otherwise so entitled under the test for prevailing party.

The magistrate's recommendation states that, "[i]t is clear by the records of counsel for the Plaintiffs that they represented Vantage and acted solely at the direction of Vantage." The district court determined that this fact alone was a sufficient basis upon which to deny the Appellants attorneys fees regardless of the results achieved by the Plaintiffs' lawsuit. The Appellants assert that the district court's conclusion that fees should not be awarded to Plaintiffs when those fees are paid by a third party is erroneous. It is the position of the Appellants that the actual financing of the fee arrangement is irrelevant to an award of fees under § 1988 if the Plaintiffs are otherwise entitled to a fee.

This Court is in agreement with the Appellants on this issue. As the United States Supreme Court has stated when discussing 42 U.S.C. § 1988, "[t]he prevailing party should ordinarily recover an attorneys fees unless special circumstances would render such award unjust." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). Numerous other

cases have allowed the prevailing party to recover an attorneys fee without regard to other factors such as the party's ability to pay his own lawyer, *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir.1986), *Cooper v. Singer*, 719 F.2d 1496 (10th Cir.1998), *overruled on other grounds*, *Venegas v. Mitchell*, 495 U.S. 82, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990), or whether the prevailing party was a lawyer representing himself *pro se* and thus not liable for fees. *Duncan v. Poythress*, 777 F.2d 1508 (11th Cir.1985). An attorneys fee award has also been awarded when counsel was receiving partial compensation from a third party, *Johnson v. University College of the University of Alabama in Birmingham*, 706 F.2d 1205 (11th Cir.1983), *Ward v. Kelly*, 515 F.2d 908 (5th Cir.1975). There is no logical distinction between the financing arrangements in the above-cited cases and the arrangements between the parties in the case at bar that would require a different result.

Accordingly, this Court is unwilling to find the type of financing arrangement herein to be a ground for attorney fee denial or a "special circumstance" that would render an award of attorneys fees unjust if such award was otherwise appropriate. If the Plaintiffs are determined to be prevailing parties under the relevant case law, this Court is of the opinion that the type of financing arrangement involved in the case should not be used as an independent basis on which to deny the Plaintiffs their deserved fees. Although we are of the opinion that the district court committed error in its determination that the Plainitffs were not entitled to fees because the litigation was financed by a third party, we will nonetheless affirm the district court's denial of fees in this case on the separate issue of prevailing party.

The Appellants' other contention on appeal is that the district court erred in its holding that the Appellants were not prevailing parties for attorneys fee purposes, thus denying the Appellants an award of fees on this

basis as well. In this connection, the magistrate's conclusion and recommendation, which by adoption became the order of the district court, was that the Plaintiffs did not obtain the relief sought in their lawsuit by means of their statutory changes made in the Colorado Charitable Solicitations Act. The United States Supreme Court case of *Texas State Teachers v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), was cited in the magistrate's recommendation for the proposition that:

> "Where a plaintiff's success on a legal claim can be characterized as purely technical or *di* [sic] *minimus* [sic], a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress has sought to promote in the fee statute." Recommendation of United States Magistrate, at 2, citing *Garland*, 489 U.S., at 792, 109 S.Ct., at 1493.

Relying upon the above-quoted language, the district court held that the Plaintiffs attacked the Colorado Charitable Solicitations Act on equal protection and First Amendment grounds and sought by their lawsuit to cause the repeal of the Act. The district court specifically held that the Act was not repealed and that any changes that were effected to certain provisions of the statute contested by the Plaintiffs on First Amendment grounds as a result of the amendments were purely technical or *di* [sic] *minimus* [sic]. The district court in addition held that the basic purpose of the Act was in fact strengthened rather than weakened by the amendments, and no change in the legal relationship between the professional fundraiser and the State of Colorado was effectuated as a result of the amendments to the Act in that Colorado did continue to regulate the activities of paid solicitors of funds. Thus,

the Plaintiffs' equal protection goals were not achieved, and any benefits to the Plaintiffs as a result of changes that were made in certain provisions of the statute were *di* [sic] *minimus* [sic] when the overall regulatory function of the Act is considered. In conclusion on this point, the district court stated that "the plaintiffs did not obtain the relief they sought and were not prevailing parties. . . ." Recommendation of the United States Magistrate, at 5.

The district court addressed the two-pronged test enunciated by the First Circuit in *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir.1978), approved by the Supreme Court in *Garland* and adopted by this Circuit in *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir.1989). The *Nadeau* test states that when there has been no judicial determination of the lawsuit on the merits, a plaintiff may nonetheless prevail for attorneys fee purposes if he can meet the catalyst test and show "(1) that [the lawsuit] is causally linked to securing the relief obtained, and (2) that the defendant's conduct in response to the lawsuit was required by law." *Foremaster*, 882 F.2d 1485, 1488, citing *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1473 (10th Cir.1985).

The district court held that the first prong of the *Nadeau* test was not met in the case at bar, and stated in part as follows:

> "The first important factor is that the defendants were not going to enforce or implement the Colorado Charitable Solicitations Act of 1988 until the results of two lawsuits which were pending before separate Supreme Courts were decided. There was pending before the United States Supreme Court the case of *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 108 S.Ct. 2667 [101 L.Ed.2d 669] (1988), and *People v. French*, 762 P.2d 1369 (Colo.1988). Immediately upon being informed of the lawsuit, both the Attorney General's office and the

District Attorney's office informed Plaintiffs' that they had not intended to nor did they intend to enforce the Act. The *Riley* case was decided on June 30, 1988, and the *French* case on October 11, 1988.

A review of the transcript of the hearing before the Senate and House Committees established that the amendments to the 1989 [sic] Act related to the *Riley* and *French* decisions. A review of the transcript established that there was no discussion of the present lawsuit before the Committees, nor is there any indication that the lawsuit was taken into consideration in modifying any of the provisions of the statute. There is no discussion in either Committee concerning an equal protection problem.

Neither counsel for the Plaintiffs or the Plaintiffs themselves appeared at any legislative hearing, nor is there any indication that correspondence was sent to the legislature by Plaintiffs' counsel or the Plaintiffs themselves . . . The attorneys' records show that the Plaintiffs' counsel simply sat in a passive mode receiving phone calls and correspondence from the defense counsel and reviewing documents that were sent to them . . . The attorneys' own records establish that the Plaintiffs' counsel were not a moving force behind the legislative changes, but remained in California in a passive role, receiving information and passing it on to their corporate client, Vantage.

I find that the Plaintiffs' attorneys' efforts were not the moving force behind the changes of the legislation. The moving force behind the legislation were the *Riley* and *French* cases. If there was any positive result of the statutory changes for the Plaintiffs, it is because they were recipients of the hard-fought efforts of other persons and other attorneys."

Recommendation of the United States Magistrate, at 6.

Because the district court held that the Plaintiffs were not prevailing parties under the first prong of the *Nadeau* test, the Court found that there was no need to address the second "required by law" element of *Nadeau.*

The Appellants assert that the district court, although correctly citing the *Garland* case, erroneously applied the standard set forth therein to the facts of this case. The Appellants state that the district court erroneously concluded that, in order to meet the standards of *Garland,* the Plaintiffs had to succeed on the central issue in the litigation in order to be eligible for attorneys fees. The Appellants assert that *Garland* states, to the contrary, that it is necessary only that the plaintiffs "be able to point to a resolution of the dispute which changes the legal relationship between [the plaintiffs] and the defendant." Appellants' Brief, at 17, citing *Garland*, 489 U.S., at 792, 109 S.Ct., at 1493. It is the position of the Appellants that this is easily achieved when the propositions urged in their lawsuit are compared with the results achieved by the statutory amendments.

The Appellants also contend that the district court erroneously based its conclusion that the Plaintiffs were not prevailing parties under *Nadeau* on a finding that "the plaintiffs' attorneys' efforts were not the moving force behind the changes of the legislation," Recommendation of United States Magistrate at 7. The Appellants assert that the district court applied too rigorous a standard to the Appellants' lawsuit and properly should have considered only whether or not the Plaintiffs' actions were a significant factor in causing the Defendants to act, rather than the moving force. *Leuthje v. Peavine School Dist.*, 872 F.2d 352 (10th Cir.1989). The Appellants state that the sequence of events itself indicates that the lawsuit was a factor in the statutory amendment, and that internal documents from the District Attorney's office indicate that the amended statute was strongly influenced by the pending legislation.

Lastly, the Appellants assert that both the *Riley* and the *French* cases relied upon by the district court as the cause of the legislative change is based upon a flawed reading of those cases. [sic.] The Appellants contend that the decision in *Riley* did not mandate the changes in the Colorado Charitable Solicitations Act because the North Carolina statute at issue in *Riley* varied significantly from the Colorado statute.

As previously stated, this Court has held that the district court's findings as to whether or not the Plaintiffs' lawsuit is a substantial factor or significant catalyst in prompting the legislative change is a factual issue which should be reviewed on appeal using the clearly erroneous standard of review. The Appellants in this case urge that the district court's conclusions on this issue rest on incorrect premises of law and should thus be reviewed *de novo*. In light of the holding of *Supre v. Ricketts*, this Court disagrees with the Appellants' argument and will review the district court's findings as to the "significant catalyst" issue using the less rigorous clearly erroneous standard.

This Court has reviewed the Colorado Charitable Solicitations Act as it existed prior to the amendments and as changed by the 1989 amendments. This Court is in agreement with the district court that the large majority of the changes should be deemed technical or *di* [sic] *minimus* [sic] and that the changes in the Act did not significantly alter the state regulation of and requirements placed on a paid solicitor in Colorado. There was no material alteration of the legal relationship between paid solicitors and the State of Colorado. The changes in the Colorado 1988 statute as a result of the 1989 amendments are as follows:

There were no changes of any consequence in Sections 6-16-101 through 6-16-103 and 6-16-110 through 6-16-113 in the Colorado Charitable Solicitations Act.

Section 6-16-104 included a provision prior to the amendments that a paid solicitor file a financial report

with the Secretary of State for any solicitation campaign within 60 days after the solicitation campaign had ended. The amended statute extended the time period to 90 days. The Appellants assert that this was a substantial change from the original statute, but this Court is of the opinion that such a change is insignificant. This section also provided prior to the amendments that the records and accounting for a solicitation campaign directed toward Colorado residents shall be kept in Colorado at the principal place of business of the paid solicitor. It also provided that the provisions of the section should apply only to a paid solicitor who solicits door-to-door or by telephone. Both of those sections were repealed in the amended Act. The Appellants assert that such repeal was not only of significant benefit to the Appellants, but caused by the Appellants' lawsuit. This Court disagrees with the Appellants on both of these contentions and finds that while the repeal of the requirement that business records be kept at a solicitor's principal place of business in Colorado may have been of some benefit to the Appellants, such benefit was merely technical and could hardly be deemed significant in light of the asserted primary purpose of the Appellants' lawsuit which was to cause repeal of the statute on equal protection grounds.

Section 6-16-106 originally prohibited a monetary contribution solicited by telephone to be collected in person. The Appellants allege that their Complaint asserted that that provision would substantially reduce the number of pledges and increase the cost of collecting donations. The provision in the section was repealed and the Appellants again assert that such repeal results in benefit to the Appellants and was caused by their Complaint. As stated in regard to the section discussed above, this Court is simply not persuaded that such a change is significant in light of Appellants' equal protection argument, and is nothing more than *di* [sic] *minimus* [sic]. The principal thrust of that section dealt with the right of a contributor to rescind his pledge (the title of the section). This right

was not changed except in only minor procedural respects and not in substance. The contributor retained the right to cancel his pledge.

Section 6-16-107 concerned the use of donated tickets in solicitation. The amendment to that section, while simplifying the procedure in regard to donated tickets, does not change the ultimate thrust of the statute in this respect and could not be considered significant.

Section 6-16-108 was obviously repealed due to the decision in *Riley* and will be covered by the discussion below regarding Section 6-16-105. In any event, Appellants in their briefs have not relied on the repeal of this section.

Section 6-16-109, which required paid solicitors to maintain certain records for three years, was amended to reduce the time to two years. Such change was of only limited benefit to the Appellants. This Court is of the opinion that the benefit was not sufficiently significant to meet the standards enunciated by the Supreme Court in *Garland*. Obviously, the legal relationship of the parties was not materialy altered by the above change in the Colorado Charitable Solicitations Act.

The one section in which the change could be viewed as having some significance is in 6-16-105 (with some repetition in 6-16-106), in which an amendment removed a provision that required a paid solicitor to inform a solicited person that a portion of his contribution may be spent on costs of soliciting and that he has a right to a written explanation of how contributions will be spent and upon request be advised of the minimum percentage guaranteed to go to the charity or that there is no such guarantee. Despite the protestations of the Appellants, this Court is persuaded that the repeal of that section was directly caused and mandated by the *Riley* case, which was pending in the United States Supreme Court before the original Act was passed and before Plaintiffs' lawsuit. It appears that the State of Colorado was awaiting this deci-

sion before enforcement of the Colorado Act and to see if it mandated legislative changes.

The *Riley* case was a challenge to the North Carolina Charitable Solicitations Act on First Amendment grounds. The North Carolina Act provided in part that professional fundraisers must disclose to potential donors the percentage of charitable contributions collected during the previous twelve months that were actually turned over to charity. The Supreme Court held that such a mandated disclosure is unconstitutional as a content-based regulation of speech. *Riley*, 487 U.S., at 795, 108 S.Ct. at 2676, citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256, 94 S.Ct. 2831, 2839, 41 L.Ed.2d 730 (1974). Thus, while the pre-amendment Colorado Charitable Solicitations Act did not require the solicitor to disclose the actual percentage that would be received by the charity, the boldface statement that was required to be included on written confirmations stated that a portion of proceeds received may be spent on solicitation expenses, and that the contributor could request a written explanation of the allocation of his contribution between the costs of solicitatation and the charity itself. The district court had reasonable information before it to find that the United States Supreme Court decision in *Riley* was the catalyst for this change in the Colorado statute. We note that *Riley* was decided by the Supreme Court on the very day that the instant lawsuit was filed.

In addition, in a transcript of a Senate hearing concerning the amended statute, a Senator states that the amended Colorado Charitable Solicitations Act "comes as a result of . . . the Supreme Court decision in regard to this subject generally." Appellants' Appendix at 454. This discussion lends support to the holding of the district court concerning the actual impetus for the only significant change in the Colorado statute. The Senator is referring to the *Riley* case in the above quotation. Colorado officials were well aware of *Riley* as well as *French* in

the Colorado Supreme Court and the potential problems that decisions in those cases might cause.

After review of the *Riley* case and the Colorado statutes, both pre and post amendment, this Court is persuaded that the district court's decision is not clearly erroneous. The changes in the Colorado statute, in particular those changes that could be deemed beneficial to the Appellants, can be traced directly to the Supreme Court's decision in *Riley*. As stated above, *Riley* was purely a First Amendment case, and thus any changes in the Colorado Charitable Solicitations Act mandated by and resulting from the *Riley* decision do not address the Appellant's equal protection concerns, which were the primary thrust of the Appellants lawsuit to effect repeal of the entire statute. There were no changes in the Colorado Charitable Solicitations Act which could be deemed to flow from Appellants' equal protection claim. And the legal relationship between paid solicitors of funds and the State of Colorado was not materially alerted by the new Act. Paid fund solicitors came under Colorado legislation by the original Act and stayed thereunder after the amended Act. The Plaintiffs' lawsuit was not "causally linked" to the statutory amendments.

Thus, the district court did not apply the wrong standards in evaluating the Plaintiffs' request for attorneys fees, and the use of the term "moving force" did not indicate that the Court was under the misapprehension that the Plaintiffs' lawsuit had to be the only cause of the statutory change to warrant an award of attorneys fees. There is every indication that the district court not only was aware of and understood the applicable law, but applied it correctly to the facts of this case on the prevailing party issue. It is worth repeating that it is the position of this Court that this catalyst portion of the prevailing party test requires a factual analysis that is reviewed by this Court under the clearly erroneous standard. There has been nothing presented to this Court that

would indicate that the district court's conclusions on this issue are clearly erroneous, and that the discretion exercised by the district court in concluding that the Appellants were not prevailing parties should be reversed.

Finally, any references by the magistrate in his recommendation to possible professional ethical violations on the part of the Appellants' attorneys were specifically excluded from the district court's adoption of the magistrate's recommendation, and so are not before this Court on appeal. The magistrate also did not address the issue of what he considered to be excessive attorneys fees claimed herein. Such issue is also not before this Court.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-Z-1015

AMERICAN COUNCIL OF THE BLIND OF COLORADO, INC., a Colorado non-profit corp., ROCKY MOUNTAIN FEDERATION OF HANDICAPPED ATHLETES, INC., a Colorado non-profit corp., *Plaintiffs,*

v.

ROY ROMER, Governor, State of Colorado, DUANE WOODARD, Attorney General, State of Colorado and NORMAN S. EARLY, JR., District Attorney for the Second Judicial District, State of Colorado,
Defendants.

RECOMMENDATION OF
UNITED STATES MAGISTRATE

[Filed May 16, 1990]

The issue of attorney's fees pursuant to 42 U.S.C. § 1988 has been referred to the Magistrate as a special master. A hearing has been held and the Magistrate enters his following recommendation:

GENERAL FACTS

Counsel for the plaintiffs have filed a petition for attorneys' fees pursuant to 42 U.S.C. § 1988. Although the litigation was simple and resolved by stipulation, counsel for the plaintiffs have submitted a bill for over $80,000

on the primary case and an additional bill for fees ot over $50,000 incurred in establishing their right to attorneys' fees. The attorneys' fees issue has generated the only depositions in discovery and hearings.

There are several issues for the court to address. They are as follows:

1. Were the plaintiffs prevailing parties, therefore, qualifying their attorneys for attorneys' fees;

2. Were counsel representing the plaintiffs, American Council of the Blind of Colorado, Inc., (Blind of Colorado) and Rocky Mountain Federation of Handicapped Athletes, Inc. (Handicapped Athletes);

3. If both of the above are answered in the affirmative, are the attorneys for the plaintiffs entitled to all or a part of the attorneys' fees for the litigation;

4. Are counsel entitled to all or a part of the attorneys' fees incurred because of the time expended for discovery and hearing on the attorneys' fees;

5. An additional issue has been raised as to the ethical behavior of the plaintiff's counsel.

PREVAILING PARTY

Subsequent to the litigation being filed, and the motion for attorney's fees, the United States Supreme Court had resolved the test for prevailing party. In *Texas State Teachers v. Garland Independent School District*, —— U.S. ——, 109 S.Ct. 1486 (1989), the teachers union filed a multiple civil rights complaint pursuant to 42 U.S.C. § 1983. A motion for summary judgment was entered for the district and against the union in all but one issue. The Court found that the issue was of "minor significance" and denied attorney's fees pursuant to § 1988. On appeal, the Fifth Circuit affirmed in part and reversed in part finding additional constitutional violations under the First Amendment. The Supreme Court held as follows[:]

> We think the language of *Nadeau v. Helgemoe*, quoted in our opinion in *Hensley*, adequately captures the inquiry which should be made in determining whether a civil rights plaintiff is a prevailing party within the meaning of § 1988. If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit" the plaintiff has crossed the threshold to a fee award of some kind. *Nadeau*, 581 F.2d, at 278-279.
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> * * *
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> Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. *Id.*, at 760-761, . . . *Rhodes v. Stewart*, 488 U.S. ——, ——, 109 S.Ct. 202, ——, . . . (1988). Beyond this absolute limitation, a technical victory may be insignificant, and may be so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status.
>
> * * *
>
> Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the "generous formulation" we adopt today has not been satisfied. . . . The touchstone of the prevailing party inquiry must be the material alternation of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*.

The Tenth Circuit Court of Appeals has interpreted *Texas State Teachers* in two recent cases. In *O'Connor v. The City and County of Denver*, 894 F.2d 1485, 1488

(10th Cir. 1990) and in *Dahlem v. The Board of Education of Denver Public Schools*, —— F.2d ——, (10th Cir. 1990) (Case 89-1116, April 23, 1990). In *O'Connor*, the director of the department testified that the city amended the code as a direct result of the lawsuit. Consequently, O'Connor and Theaters argued that they were "prevailing parties" under 42 U.S.C. § 1983 and § 1988 because of their actions caused the city to make remedial action subsequent to the commencement of the lawsuit. They asserted that they were entitled to nominal damages and resonable attorney's fees in accordance with the "catalytic effect doctrine." In *Dahlem*, the plaintiff obtained a preliminary injunction after a hearing on the issues as to whether he could compete in gymnastics where the school district provided only for girl gymnastics. The preliminary injunction was appealed. The plaintiff, Dahlem, graduated and the case was dismissed as being moot. Plaintiff's attorneys requested attorneys' fees pursuant to § 1988, which was denied because the plaintiff could not show that he would have prevailed if the suit had been pursued through full trial. The court held that a preliminary injunction requires the court to find that there was a "substantial likelihood that the movant would eventually prevail on the merits."

Based upon the above decisions, the court must determine what was intended by the plaintiffs at the time the lawsuit was filed. Mr. Moest, attorney for the plaintiffs, testified that the primary purpose of the lawsuit was to test the constitutionality of the Colorado Charitable Solicitation Act under the theory of equal protection under the Fourteenth Amendment. The attorneys for the plaintiffs believed that the Act was unconstitutional because it treated out-of-state private fund raisers differently by requiring special reports and restrictions on fund drives, which were not required to in-house charitable fund raising organizations. The special requirements placed upon private funds solicitors would detrimentally effect the ability of North American Telemarketing Co. and Vantage

to do business in Colorado. (Plaintiff's ex. 17[.]) The constitutional allegations are set forth in the plaintiffs' complaint at paragraphs 9 and 11 and make a general statement that the statute violates the plaintiffs' rights of "free speech and equal protection of the laws under the First and Fourteenth Amendments." He further testified that the intent of the lawsuit was to get the Act repealed.

I find that the plaintiffs have failed to establish that the lawsuit changed any material alteration of the legal relationship between the plaintiffs, American Council of the Blind of Colorado, Inc. and the Rocky Mountain Federation of Handicapped Athletes, Inc. and the named defendants. The plaintiffs further failed to establish a factual or legal basis for fees pursuant to the two prong test of the catalytic effect doctrine.

MATERIAL ALTERATION

Moest testified that his firm has specialized in representing firms such as Telemarketing and Vantage in addressing legislative Constitutional issues effecting the business operations of charitable solicitation. This included First Amendment and Equal Protection constitutional issues. Early in 1988, it was brought to his law firm's attention the Colorado Charitable Solicitations Act. He and Mr. Fisher of the firm discussed the issue with their client, Vantage. The time records reflect that this commenced on June 6, 1988. It was at this time they commenced billing Vantage for their legal services involving the Colorado Charitable Solicitation Act. On June 6, 1988, Vantage *did not* have a contract with Blind of Colorado. It had executed a contract with Handicapped Athletes on May 9, 1988. As indicated, Moest stated the primary concern was the reporting burden placed on outside fund raisers in comparison to the in-house fund raisers, which were not required to report under the Act. Mr. Fisher testified that the Act would have an adverse effect on the phone solicitation campaigns operated by Vantage. The intent of the suit was to repeal the statute.

A review of the Colorado Charitable Solicitation Act created in 1988 and as amended in 1989 establishes that the constitutional issue of equal protection, which concern counsel for the plaintiffs[,] was not addressed nor corrected. (Plaintiff's ex. 15/16[.]) Both Acts apply to paid solicitors or fund raisers and not to in-house fund raising by charitable organizations. Only paid solicitors must give notice to the contributor and file a report with the Secretary of State. Section 106 was repealed and reenacted authorizing the contributor to rescind the donation solicited. This provision is probably more harmful to Vantage than the previous 1988 statute. Criminal prosecution for a violation of the Act remained in tact. There are technical changes, but none address the constitutional issue of the equal protection clause of the Fourteenth Amendment or the basic reasons given by Moest and Fisher as to why the suit was filed. Furthermore, the Act was not repealed, but strengthened.

Defendants exhibit AG summarizes the changes from the 1988 Act to the 1989 Act as it relates to the allegations of the complaint. The equal protection concerns are not addressed at all by the amendments.

Counsel for the plaintiffs have not established a change in the legal relationship between the professional fund raiser and the state of Colorado. Before the lawsuit was filed and after the lawsuit was settled paid charitable fund solicitors were required to provide notice to the Secretary of State, to contributors and to file reports at the completion of campaigns. None of the requirements applied to in-house charitable organizations such as The United Fund. All of the amendments to the Colorado Solicitation Act were technical in nature and *de minimis* as to any change brought about by the lawsuit.

In summary, the plaintiffs did not obtain the relief they sought and were not prevailing parties based upon the test found in *Texas State Teachers*, *supra*. The Act was not repealed nor was it materially altered as it re-

lated to the plaintiffs' claims. *See Lewis v. Continental Bank Corp.*, 58 U.S.L.W. 4330; *Dahlem, supra.*

NADEAU TEST

To determine whether there is a prevailing party for purposes of attorney's fees where the parties have stipulated to changes or repeal of a statute, the Tenth Circuit has established the two-prong test as set forth in *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978); see *Dahlem v. The Board of Education of Denver Public Schools*, —— F.2d —— (10th Cir. 1990); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1226 (10th Cir. 1990); *Foremaster v. City of St. George*, 882 F.2d 1485, 1488 (10th Cir. 1989). The test is as follows:

1. The attorney's efforts must have been a necessary and important factor in achieving the improvements.

2. The defendants changing the statute must have been required as a matter of law as established by the lawsuit.

We will first address the attorney's efforts as having been successful in achieving the improvements. The first important factor is that the defendants were not going to enforce or implement the Colorado Charitable Solicitations Act of 1988 until the results of two lawsuits which were pending before separate Supreme Courts were decided. There was pending before the United States Supreme Court the case of *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 108 S.Ct. 2667 (1988) and *People v. French*, 762 P.2d 1369 (Colo. 1988). Immediately upon being informed of the lawsuit, both the Attorney General's office and the District Attorney's office informed plaintiffs counsel that they had not intended to nor did they intend to enforce the Act. The *Riley* case was decided on June 30, 1988 and the *French* case on October 11, 1988.

A review of the transcripts of the hearings before the Senate and House committees established that the amend-

ments to the 1989 Act related to the *Riley* and *French* decisions. (Plaintiffs' ex. 10, pp. 4, 12, 13, 26, 27, 32, 33)[;] (Plaintiffs' ex. 12, p. 3)[;] (Defendants' ex. A, p. 5813)[.] A review of the transcripts establishes that there was no discusison of the present lawsuit before the committees, nor is there any indication that the lawsuit was taken into consideration in modifying any of the provisions of the statute. There is no discussion in either committee concerning an equal protection problem.

Neither counsel for the plaintiffs or the plaintiffs themselves appeared at any legislative hearing, nor is there any indication that correspondence was sent to the Legislature by plaintiffs' counsel or the plaintiffs themselves. The plaintiffs exhibits 20-26 all relate to correspondence sent by the district attorney, Richardson, to plaintiffs' counsel informing them as to the changes being made at the legislative level. There is no correspondence from plaintiffs counsel, either assisting or making recommendations in the changes of the statute. There apparently was one meeting in November where plaintiffs counsel met with defense counsel in order to discuss the legislation. The attorney's records show that the plaintiffs counsel simply sat in a passive mode receiving phone calls and correspondence from the defense counsel and reviewing documents that were sent to them. Furthermore, these documents were then sent to Vantage, never to the named plaintiffs in this lawsuit. The attorneys own records establish that the plaintiffs' counsel were not a moving force behind the legislative changes, but remained in California in a passive role, receiving information and passing it on to their corporate client, Vantage.

I find that the plaintiffs' attorneys' efforts were not the moving force behind the changes of the legislation. The moving force behind the legislation were [sic] the *Riley* and *French* cases. If there was any positive result of the statutory changes for the plaintiffs, it is because they were recipients of the hard fought efforts of other persons and other attorneys.

During the hearing it became quite evident why counsel may have become passive around November of 1988. The Blind of Colorado had completed its fund raising early in October and had informed Vantage that it would not enter into another contract with the organization. They were not pleased with the results of the organization. Handicapped Athletes began having problems with North American by July of 1988. By November, all contact with the solicitor for Vantage had been terminated. The director of Handicapped Athletes indicated that he was communicating concerning the solicitation contract with Mr. Kahn's office because of the acrimony between the two organizations. The director testified that he considered Vantage as having failed to complete the solicitation agreement. He further indicated that no additional contracts would be entered into with Vantage.

Both compaigns had been completed by October of 1988. Neither named plaintiff had any further interest in the legislation. Both directors testified that the only reason they permitted the name of the organizations to be used as plaintiffs in the suit was because they were informed by Vantage and Mr. Fisher that the solicitation campaigns, which were ongoing would be shut down on July 1, 1988. Their purpose of entering into the lawsuit was to prevent the solicitations from being stopped. After the campaigns had been completed, the lawsuits became moot as to the plaintiffs, Handicapped Athletes and Blind of Colorado. Counsel for the plaintiffs knew the plaintiffs no longer had a interest in the lawsuit. All communications since the commencement of lawsuit had been with Vantage and not with the plaintiffs. Plaintiffs' counsel's time records and ther testimony established that they did not communicate with the plaintiffs. After October of 1988, all communications were with Vantage and it was Vantage that approved the final agreement to settle the case in May of 1989. The directors of Handicapped Athletes and Blind of Colorado indicated that they were not informed of the settlement of the lawsuit. Handicapped

Athletes believed that they may have found out about the settlement through another charitable organization.

After completion of the solicitation contracts in October, 1988, the plaintiffs no longer had a personal stake in the suit or a judicable issue. *See Lewis v. Continental Bank Corp., supra.* Counsel did not inform the court, but continued to advise and bill Vantage for its services until the dismissal of the case in May, 1989.

CONDUCT REQUIRED BY LAW

The second prong of the *Nadeau* test is the results of the legislation. If the results of the legislation require the defendants to do something that was required by law and as a result of the lawsuit, then the plaintiffs can claim that they are prevailing parties. Since the plaintiffs were not successful in the repeal of the statute or modifying the statute under the theory of equal protection, there was no showing that the named defendants were required to change their legal relationship to the plaintiffs as a matter of law. As a result, the second prong of the *Nadeau* test also fails.

In summary, the plaintiffs were not prevailing parties for purposes of attorneys' fees under any of the existing tests.

ATTORNEY REPRESENTATION

If the plaintiffs had been prevailing parties, the issue raised is whether the law firm of Fleishman, Fisher and Moest and local counsel, Kelly, Haglund, Garnsey & Kahn represented Vantage and North American Telemarketing or the named plaintiffs, Handicapped Athletes and Blind of Colorado. Both Moest and Fisher testified that the firm had represented Vantage and North American Telemarketing for five years. They had filed constitutional lawsuits for the company in other jurisdictions, both in its name and the in the names of other charitable organizations. That it was brought to their attention that Colorado had passed a Charitable Solicitation Act, which

they felt may effect the ability of their client, Vantage, to operate private fund raising activities in Colorado for profit.

The following chronological events occurred:

Date:	Event:
6/6-8	Fisher & Moest commence their research, conferenced with Coplevitz, the attorney for fire and police unions and with their client, Vantage. At that time they had discussed with Vantage and the other counsel strategy for attacking the Act in Colorado.
6/9	Fisher called Vantage concerning contacts with the Rocky Mountain Federation of the Handicapped Athletes and as to the status of the American Council for the Blind contract.

It should be noted that on June 9, 1988 a contract was signed by the American Council of the Blind and at the time that it entered into that contract it was not informed of the concerns of counsel by Vantage or Vantage of the Charitable Solicitation Act or any legal problems with the Act.

6/9-21	Counsel continued to prepare motions, briefs, discuss strategy with Vantage and other counsel, retain local counsel, Kahn, and research the legislative history. All of these reports and discussions were with Vantage.
6/21	A phone call was made to Vantage and a conference phone call made with Handicapped Athletes and Blind of Colorado. Prior to that phone call, Bob Chamberlin of Vantage had contacted the directors of the organizations and indicated that Vantage would be unable to continue the solicitation campaigns unless a lawsuit was filed. Fisher, on June 21, had a telephone conversation with both directors explaining the nature of the suit, his law firm and that Vantage would pay all legal fees and costs

if they would permit their names to be used as plaintiffs. Colorado Blind, at that time, asked for additional information concerning the law firm, which was mailed on the same date.

6/21-24 Counsel continued to do research, planning, drafting, reviewing legislation history, which had been prepared by Mr. Kahn, and preparing for a lawsuit, although Handicapped Athletes and Blind of Colorado had not retained the law firm.

6/24 Fisher called the director of Handicapped Athletes "confirming the Rocky Mountain Federation of Handicapped Athletes agreed to be plaintiff, interviewed him concerning the organization, and preparation of his declaration."

6/24-29 Counsel continued to do research and consultation with Vantage concerning "strategy."

6/27-28 Vantage, Moest and Fisher discuss a possibility of Black Shriners becoming a plaintiff to the case. Calls were made by Fisher to the director of the Black Shriners, with North American's Chamberlin on the 27th and 28th attempting to enlist them as possible plaintiffs.

6/29 Fisher flew to Denver where he met for the first time with the directors of Handicapped Athletes and Blind of Colorado. No strategy was discussed. The legal pleadings were signed by the directors with the assurances that all costs and fees would be assumed by Vantage. Mr. Kahn's time records would indicate that the purpose of meeting with the two directors was to have them sign their declarations and that the total time expended was approximately two hours, which included going to the different offices.

6/30-8/26 All strategy conferences, legal material and communications were with Vantage. On August 26, Fisher's records reflect a phone call to

clients "re: result of hearing." This is confirmed by the directors of Handicapped Athletes and Blind of Colorado that sometime after June 29 the only communication with counsel was the day of the preliminary injunction hearing.

8/26-5/1989 All communications were with Vantage. There was one contact each with Handicapped Athletes and Blind of Colorado for the purposes of having them answer discovery. A .33 minute phone call to Blind of Colorado concerning discovery was made on October 18. There are no communications with Handicapped Athletes until February 15, 1989. It is undisputed that the February 15 call related to another matter unrelated to this lawsuit. As previously noted, Handicapped Athletes was in a legal dispute with Vantage concerning the solicitation contract. No copies of any pleadings, amended legislation, settlement discussions, settlement documents, or letters were provided to Handicapped Athletes or Blind of Colorado.

It is clear by the records of counsel for the plaintiffs that they represented Vantage and acted solely at the direction of Vantage. All legal research, discussions concerning legal strategy, discussions of filing pleadings, discussions concerning settlement and final authorization of settlement was with Vantage. Plaintiff's counsel's only personal contact with the directors for the Handicapped Athletes and Blind of Colorado was on June 28, 1988, when the signatures were obtained on the declarations. As previously indicated, the total time of Mr. Kahn's records was approximately two hours for both persons. Besides the total lack of communication with the directors of the plaintiffs in this case, all other factors establish that the plaintiffs clients were Vantage.

Settlements cannot be approved without the consent of the parties. *Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892, 893 (10th Cir. 1975); *Cross v. District Court*

in and for the First Judicial District, 643 P.2d 39-41 [sic] (Colo. 1982). Neither the stipulation for preliminary injunction in August or the final stipulation of judgment entered into in May were ever discussed with or approved by the named plaintiffs in this case, Handicapped Athletes or Blind of Colorado. Plaintiff's counsel dealt directly with Vantage.

At of the end of October of 1988, the civil action for injunctive relief became moot as to both of the named plaintiffs. Both plaintiffs had terminated their contracts with Vantage and because of a dissatisfaction with Vantage, did not intend to enter into any further contracts with the organization. The named plaintiffs had nothing to gain or loose by the lawsuit remaining in effect. For all purposes, the suit now became moot. Only Vantage had a reason to maintain or keep the lawsuit going because the statute would effect its ability to act as a private fund solicitor in Colorado for other possible clients.

Another factor establishes that the attorneys were not representing the named plaintiffs. Both counsel on the stand indicated they did not look at or review the Handicapped Athletes or Blind of Colorado solicitation contracts with Vantage and were not familiar with the terms or the length of the solicitation campaigns. Since the directors entered into an agreement to have the names of their organizations as plaintiffs because the statute would effect their solicitation contracts, it would be unusual for the counsel not to look at the contracts prior to filing the lawsuit. Because the attorneys for Vantage were not interested in the plaintiffs contracts because they were protecting Vantage's right to operate in Colorado, the contracts were immaterial.

The courts have authorized attorney's fees pursuant to § 1988 where plaintiff is a prevailing party. *Jones v. Wilkenson*, 800 F.2d 989, 991 (10th Cir. 1986). Here, I have found that the plaintiffs were not the prevailing

parties, but if they were, counsel represented a non-party, Vantage and North American.

It is the party, not the attorneys, who are entitled to attorney's fees pursuant to § 1988. *Brown v. General Motors Corp.*, 722 F.2d 1009, 1012 (2nd Cir. 1983); *In Benitez v. Collozo & Collozo*, 888 F.2d 930, 932-33 (1st Cir. 1989). In *Benitez*, an attorney was retained under a contract with Puerto Rico Legal Services to represent juveniles in a civil rights suit contesting the conditions of confinement. As a result of the suit, the Court ordered a less restrictive environment. Attorney's fees were awarded, claiming that a portion of the fees should have been provided directly to him. The appeal was without the approval of the plaintiffs. The Court held that the attorney had no standing to petition for an appeal for attorney's fees pursuant to § 1988 since the attorney's fees go to the party not to the attorney. Neither Vantage or North American were parties to this case. Counsel are not entitled to attorneys' fees pursuant to § 1988.

CODE OF PROFESSIONAL CONDUCT

There has been raised as an issue at the hearing and in the briefs of the parties, as to whether the Code of Professional Conduct for attorneys has been violated. Testimony was presented at the time of the hearing by a professor of law at the University of Denver. Although the professor testified that he did not find any violation of the Code of Professional Conduct, I strongly disagree.

DR 5-107

DR 5-107 addresses the problem of an attorney's allegiance to a client. Section 2(B) states:

> A lawyer shall not permit a person who recommends, employs or pays him to render legal service for another *to direct or regulate his professional judgment in rendering legal services.* See also EC 5-21, 22 and 23.

In this case, all legal recommendations and control of the case were by Vantage. Vantage paid for the legal fees and made the decisions. The record is void of any legal recommendations or communications with the named plaintiffs, Handicapped Athletes or Blind of Colorado. The sole function of the named plaintiffs was to sign the declarations on June 28, 1988, which were attached to complaints and petitions which had been discussed with and approved by Vantage. It was Vantage who eventually authorized the settlement, and it was Vantage who received all of the settlement documents and papers.

DR 2-103(C)

DR 2-103(C) states:

> A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associates or any lawyer affiliated with him or his law firm, as a private practitioner . . . .
>
> > (E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his service has done so as a result of conduct prohibited under the disciplinary rule . . . .

As previously noted, Fisher commenced his research and legally advised his client Vantage of his concern about the Colorado Charitable Solicitation Act on June 16, 1988. He discussed "strategy" of the Colorado lawsuit with management of Vantage on June 7. It was Fisher who called Vantage on June 9 "re: contacts at Rocky Mountain Federation of Handicapped Athletes and status with American Council of the Blind." The Blind of Colorado had not entered into a contract for solicitation with Vantage until some time on June 9, 1988. It was Fisher and the law firm that made the determination that Vantage would not be the named plaintiff, but that Vantage would solicit charitable organizations in Colorado to be the

named plaintiffs. According to the directors of Handicapped Athletes and Blind of Colorado, Chamberlin approached them and told them that Vantage would not be able to continue the contracted charitable solicitation unless a lawsuit was filed before July 1. He indicated the Act would shut down their solicitation. Chamberlin then arranged for a telephone conference with Fisher. Fisher's records reflect that he talked to the Handicapped Athletes director on June 15 for approximately a half an hour. He then, with Chamberlin, talked to the Handicapped Athletes and Blind of Colorado's directors on June 21 for approximately an hour. At that time, the director of Blind of Colorado requested additional information from Fisher concerning his law firm. The time records reflect that Fisher mailed to Blind of Colorado that information on the same date. On June 24, Fisher called Handicapped Atheltes to determine whether or not the group was agreeing to be the plaintiff in the suit. Fisher, at that time, obtained from the director information concerning the organization in order to prepare the necessary papers for the declaration.

There is a clear violation of DR 2-103. As part of the "Colorado strategy" Fisher planned with Vantage to find Colorado charitable organizations to be plaintiffs. Vantage, then through Chamberlin, solicited the directors of Handicapped Athletes and Blind of Colorado as possible plaintiffs. Further contacts were also made by Fisher and Chamberlin with the Black Shriners. The records of Mr. Kahn reflect contact also with another charitable organization. Handicapped Athletes and Blind of Colorado did not become clients until June 24 and only after being informed that their solicitations would be shut down on July 1. As it will be noted later, that information provided was inaccurate and probably false or a misrepresentation. It is clear that Vantage and Fisher solicited the plaintiffs as clients for Fisher and his law firm.

DR 2-104

DR 2-104(A) provides:

> A lawyer who has given unsolicited advise orally to a nonlawyer that he should obtain counsel or take legal action shall not accept employment resulting from that advise . . . .

As indicated above, on June 9, 1988 as a part of the Colorado strategy, Vantage would not be the plaintiff in the case, and it had to seek out charitable organizations to be the plaintiffs in the case. Based upon that June 9 conference with Fisher, Chamberlin approached the directors, who are not attorneys concerning the filing of the lawsuit. Fisher, further participated in advising the directors, who are laypersons, on June 21. It was on that date that the Blind of Colorado director requested additional information concerning the law firm before making a decision concerning being involved in the lawsuit. Both Fisher and Fisher through Chamberlin provided unsolicited legal advice to nonlawyers, the directors of the charitable organizations. As a result of that advice, Fisher then accepted duties as the attorney filing the action for the charitable organizations.

ADDITIONAL ETHICAL CONCERNS

Certainly the interest of Vantage and the charitable organizations were not the same. Vantage wanted to test the statute for financial reasons. They wanted to continue to operate in Colorado and to sell their services to other charitable organizations. The directors testified that the sole reason for their entering into the suit was their concern that the contract solicitations with Vantage would be terminated or stopped on July 1, 1988. The interest of the parties were not the same in determining or declaring the Act unconstitutional or as to the eventual amendments which were made to the Act.

Furthermore, the Handicapped Athletes had a conflict with counsel after July of 1988. As the director of Handi-

capped Athletes testified, he believed that Vantage had breached the contract with his organization. The communications between Vantage and the director became so poor that by November of 1988 he was dealing with Vantage through Kahn's office. Despite this conflict, Vantage and Fisher continued to prosecute a civil action on behalf of Handicapped Athletes. All of the above are in possible violation of Canon 7.

DR 7-102(A)(3) & (5)

DR 7-102(A)(3) and (5) provides in pertinent part:

> In his representation of a client, a lawyer shall not . . . conceal or knowingly fail to disclose that which he is required by law to reveal . . . knowingly make a false statement of law or fact . . . .

The plaintiff directors were told by Chamberlin and possibly Fisher that the solicitation campaigns would have to be stopped if no suit was filed. At the time that Vantage entered into the contract with Blind of Colorado, it was already on notice and had discussed with Fisher the possible lawsuit to be filed in Colorado. It did not inform Blind of Colorado of the possible problem. Twelve days later it turned around and told Blind of Colorado that it could not carry out the contract which it had entered into because of the statute. Furthermore, a review of the statute would indicate that the statute does not provide for injunctive action to stop a fund solicitation. If an organization does not comply with the Act, the Act provides for a loss of tax exemption under § 6-16-109(2) and criminal penalties under § 6-16-111. Furthermore, the contracts having been entered into prior to the enactment date of July 1, 1988 of the Act, they, in all probability, would not have been subject to the Act. Section 5 of the Act states that it applies only to solicitations on or after the enactment date of July 1, 1988. Ex post facto laws would prevent it being applied to the plaintiffs. Furthermore, in order to prevent the state from closing down the solicitations, the organization only

needed to provide and file the necessary documents required by the Act. Furthermore, the organizations were led to believe that the state would stop the solicitations when in fact no one from Vantage or from the law firm had ever approached the state or the district attorney's office to see if the statute would be enforced and the manner in which it would be enforced. If such contact had been made, they would have been told that no enforcement would be contemplated because of the outstanding appellate decisions. Further, no threat or notice was ever given to Vantage or any other charity in the state that the statute would be enforced.

The testimony of the directors would indicate that they were not provided accurate facts when they were requested to become plaintiffs in the case nor were they provided proper legal advise.

This court has the power to regulate the conduct of attorneys appearing before it. The Tenth Circuit has long-recognized that "the control of attorney's' conduct in trial litigation is within the supervisory powers of the trial judge, and his performance in this area is a matter of judicial discretion." *Redd v. Shell Oil Co.*, 518 F.2d 311, 314 (10th Cir. 1975). *See Waters v. Western Co. of North America*, 436 F.2d 1072, 1073 (10th Cir. 1971). In addition, "[t]he federal court is free to and should take measures against unethical conduct if and when it occurs in connection with any proceeding pending before it." *Sanders v. Russell*, 401 F.2d 241, 246 (5th Cir. 1968). *See Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268, 270-71 (2d Cir. 1975). At the same time, however, "[t]he business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it." *W.T. Grant Co. v. Haines*, 531 F.2d 671, 677 (2d Cir. 1976). Proposed ABA Standards of Judicial Conduct require the reporting of unethical actions of counsel. ABA 1990 Code of Judicial

Conduct Code 3(D)(2). The Code is not in effect, but serious consideration as to reporting the conduct is recommended to the court.

REASONABLE FEES

In this case, the conduct of plaintiffs' counsel is aggravated by excessive request for attorneys' fees. Because the court has found that counsel are not entitled to attorneys' fees, I will not address that issue. It should be noted the counsel cannot request attorneys' fees for time expended before being retained by Handicapped Athletes and Blind of Colorado. June 24, 1988 is the earliest date for Handicapped Athletes and June 29 for Blind of Colorado. Both organizations terminated the contracts with Vantage in October and counsel never communicated with the organizations after that date. Defendants should not be required to pay fees for services which were not rendered the plaintiffs after that date. There was no longer a personal stake in the suit by the plaintiffs. *See Lewis v. Continental Bank Corp., supra.*

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Motion for Attorney's Fees by all of plaintiffs' counsel be denied with each party to bear its own costs.

DATED at Denver, Colorado this 16th day of May, 1990.

BY THE COURT:

/s/ D.E. Abram
D.E. ABRAM
United States Magistrate

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-Z-1015

AMERICAN COUNCIL OF THE BLIND OF COLORADO, INC., a Colorado non-profit corporation; ROCKY MOUNTAIN FEDERATION OF HANDICAPPED ATHLETES, INC., a Colorado non-profit corporation,

Plaintiffs,

v.

ROY ROMER, Governor, State of Colorado; DUANE WOODARD, Attorney General, State of Colorado, and NORM S. EARLY, JR., District Attorney for the Second Judicial District, State of Colorado,

Defendants.

Civil Action No. 88-Z-1016

FRATERNAL ORDER OF POLICE, LODGE # 1, and FRATERNAL ORDER OF POLICE STATE LODGE, and COLORADO LAW ENFORCEMENT OFFICERS ASSOCIATION, and EDWARD A. GILBREATH,

Plaintiffs,

v.

DUANE WOODARD, as he is Attorney General of the State of Colorado; ROY ROMER, as he is Governor of the State of Colorado, and NORMAN S. EARLY, JR., District Attorney for the Second Judicial District, State of Colorado,

Defendants.

Civil Action No. 88-Z-1331

QIVUT, INC.,

Plaintiff,

v.

DUANE WOODARD, Attorney General of Colorado; and ROY ROMER, Governor of Colorado; NORM S. EARLY, JR., District Attorney for the Second Judicial District, State of Colorado,

Defendants.

ORDER

[Filed Nov. 7, 1990]

This matter is before the Court on Plaintiffs' Objections To Recommendation Of United States Magistrate Filed May 16, 1990. The Court is required to review de novo all portions of the Magistrate's recommendation to which objections have been filed. *See* 28 U.S.C. § 636(b). The Court has done so, and has considered carefully the recommendation of the Magistrate, the objections, defendants' response, and the applicable case law. The Court is satisfied that the Magistrate's recommendation is correct and hereby accepts and adopts the Magistrate's findings and recommendation. Therefore, it is

ORDERED that plaintiffs' Motion for Attorney's Fees is denied. The parties shall bear their own costs.

DATED at Denver, Colorado, this 7th day of November, 1990.

BY THE COURT

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK, Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-Z-1015

AMERICAN COUNCIL OF THE BLIND OF COLORADO, INC., A Colorado Non-Profit Corporation; ROCKY MOUNTAIN FEDERATION OF HANDICAPPED ATHLETES, INC.[,] A Colorado Non-Profit Corporation,

Plaintiffs,

v.

ROY ROMER, GOVERNOR, STATE OF COLORADO; DUANE WOODARD, ATTORNEY GENERAL, STATE OF COLORADO; NATALIE MEYER, SECRETARY OF STATE, STATE OF COLORADO,

Defendants.

MINUTE ORDER

[Filed Nov. 26, 1990]

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Administrative Secretary

Dated: November 26, 1990

It is ORDERED that Plaintiffs' Motion For Reconsideration is denied. It is

FURTHER ORDERED that this Court takes no position nor expresses any opinion as to the ethical conduct of plaintiffs' attorneys, since the Magistrate's comments on that subject were not necessary to this Court's order denying attorneys' fees.

APPENDIX E

HOUSE BILL NO. 1176. [1988]

* * * *

6-16-105. *Oral and written disclosures.* (1) Prior to orally soliciting a contribution, either by telephone or otherwise, a paid solicitor shall clearly and conspiciously disclose at the time of solicitation his full legal first and last name and that he is a paid solicitor.

(2) A paid solicitor who makes an oral solicitation by telephone, door-to-door, or otherwise shall furnish to each contributor, prior to collecting or attempting to collect the contribution, a written confirmation of the expected contribution, which shall contain the following information clearly and conspicuously:

(a) The full legal first and last name, legibly signed or handprinted, of the individual paid solicitor who directly communicated with the contributor;

(b) The full legal name and address of the employer of such paid solicitor, if any;

(c) A disclosure of the extent to which, if at all, a contribution is tax deductible under 26 U.S.C. sec. 170, in capital letters of no less than ten-point, bold-faced type;

(d) The following statement, verbatim, in capital letters of no less than ten-point, bold-faced type:

> PLEASE NOTE: A PORTION OF CONTRIBUTIONS MAY BE SPENT ON COSTS OF THE SOLICITATION PROCESS, INCLUDING COMPENSATION FOR PAID SOLICITORS. YOU HAVE THE RIGHT, BEFORE YOU CONTRIBUTE, TO A WRITTEN EXPLANATION OF HOW CONTRIBUTIONS WILL BE SPENT.

(e) The amout of the expected contribution;

(f) The name and address of the contributor;

(g) The address and telephone number of the telephone room or other location from which the solicitation has been or is being conducted if such information is different than that which is provided in paragraph (b) of this subsection (2);

(h) The date of the individual solicitation, including the year, month, and day; and

(i) The name, address, and telephone number of any charitable organization connected with the solicitation and a person in the organization to contact for information.

(3) Except for the amount of the expected contribution, a written solicitation shall contain the same information as is required in subsection (2) of this section.

(4) Upon request from the contributor for an explanation pursuant to the disclosure set forth in paragraph (d) of subsection (2) of this section, a paid solicitor shall furnish the contributor, prior to collecting the contribution, with a written explanation of how contributions are being spent and will be spent. The explanation shall include a statement of the minimum percentage of the gross proceeds of the solicitation campaign guaranteed by the paid solicitor, pursuant to contract or otherwise, to go to a charitable organization or to the charitable purpose as represented by the paid solicitor. Costs of the solicitation process shall not be included as part of the minimum guaranteed percentage but shall be included in the computation of the gross proceeds. Said disclosure statement shall be in capital letters of no less than ten-point, bold-faced type, and shall read as follows:

THE MINIMUM PERCENTAGE OF ALL PROCEEDS FROM CONTRIBUTIONS GUARANTEED TO GO TO A CHARITABLE ORGANIZATION OR CHARITABLE PURPOSE IS ( ) PERCENT.

If there is no minimum guaranteed percentage, the ten-point, bold-faced disclosure statement shall be as follows:

THERE IS NO MINIMUM PERCENTAGE OF ALL PROCEEDS FROM CONTRIBUTIONS GUARANTEED TO GO TO A CHARITABLE ORGANIZATION OR CHARITABLE PURPOSE.

Either of the mandatory disclosures set forth in this subsection (4) may be accompanied by any other explanatory statements by the paid solicitor, so long as the written explanation as a whole does not constitute charitable fraud pursuant to section 6-16-111(1)(f) or (1)(g).

(5) The disclosure requirements provided in this section shall not apply if no portion of the proceeds from a solicitation campaign are being used or will be used for the costs of the solicitation process.

6-16-106. *Collection of contributions—right to rescind.* (1) In the case of a solicitation by a paid solicitor by telephone, no person shall collect or attempt to collect the agreed upon contribution in person unless the expected contribution is not monetary in nature or a product will be provided by the paid solicitor in exchange for the contribution. Prior to collecting any contribution in person under those circumstances where such collection is permitted, a paid solicitor shall orally inform the potential contributor as follows:

"A PORTION OF CONTRIBUTIONS MAY BE SPENT ON COSTS OF THE SOLICITATION PROCESS, INCLUDING COMPENSATION FOR PAID SOLICITORS. YOU HAVE THE RIGHT, BEFORE YOU CONTRIBUTE, TO A WRITTEN EXPLANATION OF HOW CONTRIBUTIONS WILL BE SPENT.". [sic]

(2) A contributor shall have the right to rescind at any time his agreement or pledge to contribute with regard to a solicitation which fails to comply with this article or, in all other circumstances, at any time prior to sending in the contribution.

6-16-107. *Donated tickets—sponsored attendance.* (1) No paid solicitor, in the course of a solicitation, shall

represent that tickets to an event will be donated for use by another or that a contribution of a certain amount will sponsor a certain number of persons to attend an event unless:

(a) Prior to any such solicitation, the paid solicitor obtains a written commitment from any person or organization which will be the represented beneficiary of the donated tickets or the sponsorship, which commitment states that the beneficiary will accept the donated tickets or the sponsorship and specifies the number of persons such beneficiary is willing to send to the event; and

(b) At the time of an individual solicitation, the number of persons committed to attend the event exceeds the number of tickets or sponsorships already donated by contributors.

(2) Whenever an organization is the beneficiary, the written commitment must be signed by an officer, director, or high managerial agent of such organization.

* * * *

APPENDIX F

SENATE BILL NO. 32. [1989]

BY SENATORS Wham, Gallagher, and McCauley; also REPRESENTATIVES Mutzebaugh, P. Hernandez, Mares, Pierson, Shoemaker, Taylor-Little, Webb, and S. Williams

CONCERNING THE "COLORADO CHARITABLE SOLICITATIONS ACT", AND MAKING AN APPROPRIATION IN CONNECTION THEREWITH.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. The introductory portion to 6-16-103 (7), Colorado Revised Statutes, as amended, is amended to read:

6-16-103. *Definitions.* (7) "Paid solicitor" OR "PROFESSIONAL FUND RAISER" means a person who, for monetary compensation, performs any service in which contributions will be solicited in this state by such compensated person or by any compensated person he employs, procures, or engages, directly or indirectly, to solicit for contributions. The following persons are not "paid solicitors" OR "PROFESSIONAL FUND RAISERS":

SECTION 2. 6-16-104(1)(d), (1)(e), and (2), Colorado Revised Statutes, as amended, are amended to read:

6-16-104. *Notice and reporting requirements.* (1)(d) A [full and fair description] STATEMENT, NOT IN VIOLATION OF SECTION 6-1-111(1)(f) OR (1)(g), of the nature of the intended solicitation campaign, including THE MEANS OF COMMUNICATION TO BE USED IN THE SOLICITATION CAMPAIGN, the pro-

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Capital letters indicate new material added to existing statutes; [Bracketed material was struck through on original to indicate deletions].

jected commencement and conclusion dates, and a description of any event the solicitation campaign will lead up to;

(e) A [full and fair description] STATEMENT, NOT IN VIOLATION OF SECTION 6-16-111(1)(f) OR (1)(g), of the [program] CHARITABLE PURPOSE for which the solicitation campaign is being carried out; and

(2) Within [sixty] NINETY days after a solicitation campaign has been concluded, a paid solicitor, or a charitable organization on the behalf of which the paid solicitor has been retained for the solicitation campaign, shall file with the secretary of state a financial report for such campaign, including gross proceeds and an itemization of all expenses or disbursements for any purpose. The report shall be signed by the paid solicitor, or an authorized official thereof, and by an authorized official of any charitable organization on the behalf of which the solicitation campaign was conducted. Said persons shall certify that the financial report is true and complete to the best of their knowledge.

SECTION 3. 6-16-105. Colorado Revised Statutes, as as amended, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

6-16-105. *Written confirmation of contribution—disclosures.* (1) A paid solicitor who makes an oral solicitation by telephone, door-to-door, or otherwise shall furnish to each contributor, prior to collecting or attempting to collect any contribution, a written confirmation of the expected contribution, which shall contain the following information clearly and conspicuously:

(a) The full legal name, address, and telephone number of the employer of the individual paid solicitor who directly communicated with the contributor;

(b) A disclosure that the contribution is not tax deductible, if such disclosure is applicable;

(c) A disclosure in capital letters of no less than ten-point, bold-faced type identifying the paid solicitor as a paid solicitor or professional fund raiser;

(d) The address and telephone number of the telephone room or other location from which the solicitation has been or is being conducted if such information is different than that which is provided pursuant to paragraph (a) of this subsection (1); except that this information is not required to be provided if telephone solicitations are being conducted from more than one location and from the residences of the individual paid solicitor or professional fund raiser;

(e) The name, address, and telephone number of any charitable organization connected with the solicitation or any organization the name or symbol of which has been used in aid of or in the course of such solicitation;

(f) The amount of any expected monetary contribution;

(g) The name and address of the contributor, as well as the date of the individual solicitation, or spaces where this information may be filled in by the contributor.

(2) If the contributor is absent when the contribution is to be collected, the paid solicitor may comply with subsection (1) of this section by furnishing the written confirmation in a manner previously agreed upon between said solicitor and the contributor.

(3) Except for the amount of the expected contribution, a written solicitation shall contain the same information as is required in subsection (1) of this section.

SECTION 4. 6-16-106, Colorado Revised Statutes, as amended, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

6-16-106. *Contributor's right to cancel.* (1) In addition to any right otherwise provided by law with respect to the binding nature of an agreement or pledge to make

a charitable contribution, a contributor shall have the right to cancel his agreement or pledge to contribute as follows:

(a) With respect to a solicitation in which the paid solicitor knowingly fails to comply with this article, at any time; or

(b) Until 12 midnight of the third business day, or with respect to a nonmonetary contribution, until 12 midnight of the first business day after the day on which the contributor receives a written confirmation of contribution pursuant to section 6-16-105.

(2) Cancellation occurs when the contributor gives written or oral notice of the cancellation to the paid solicitor at the address or telephone number stated in the written confirmation of contribution.

(3) Notice of cancellation, if given by mail, is given at the time it is properly addressed and deposited in a mail box with proper postage.

(4) A particular form shall not be required for a notice of cancellation, and such notice shall be sufficient if it indicates the intention of the contributor to cancel his pledge to contribute.

(5) Within ten days after a notification of cancellation has been received by the paid solicitor, the paid solicitor shall tender to the contributor any contribution made and any note or other evidence of indebtedness.

(6) Allowing for ordinary wear and tear or consumption of the goods contemplated by the transaction, within a reasonable time after an agreement or pledge to contribute has been cancelled, the contributor upon demand must tender to the paid solicitor any goods or items delivered by the paid solicitor in connection with the contribution but shall not be under obligation to tender at any other place than where the goods or items were delivered. If the paid solicitor fails to demand possession

of the goods or items within a reasonable time after cancellation, the goods or items become the property of the contributor without obligation to contribute. For purposes of this subsection (6), forty days is presumed to be a reasonable time.

SECTION 5. 6-16-107, Colorado Revised Statutes, as amended, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

6-16-107. *Donated tickets—sponsored attendance.* No person, in the course of or in aid of a solicitation, shall represent that a contribution will purchase a ticket or tickets to be donated for use by another, sponsor the attendance of another at an event, or sponsor the receipt of a benefit by another while knowing that the donated tickets or sponsorships will not actually be used or received by the donees or beneficiaries in the quantity represented.

SECTION 6. The introductory portion to 6-16-109(1) and 6-16-109(1)(a), (1)(d), (1)(f), (1)(g), (2), and (3), Colorado Revised Statutes, as amended, are amended, and the said 6-16-109(1) is further amended BY THE ADDITION OF A NEW PARAGRAPH, to read:

6-16-109. *Records—accounts.* (1) During each solicitation campaign, a paid solicitor shall create and maintain, for not less than [three] TWO years after the completion of such campaign, the following records:

(a) Copies of all written confirmations [required by] OR ANY STANDARDIZED WRITTEN CONFIRMATIONS PROVIDED PURSUANT TO section 6-16-105;

(d) [All written commitments required by section 6-16-107, together with records indicating the number in attendance at the event] RECORDS INDICATING THE QUANTITY OF DONATED TICKETS OR SPONSORSHIPS, AS DESCRIBED IN SECTION 6-16-107, WHICH WERE ACTUALLY USED OR RECEIVED BY DONEES OR BENEFICIARIES,

(f) All written records relating to pitches, sales approaches, or disclosures used during any solicitation campaign and all instructions provided to paid solicitors concerning the content or solicitations; [and]

(g) All contracts or agreements made with charitable organizations or other represented beneficiaries of solicitations; AND

(h) For each contribution, records indicating the name and address of the contributor, the amount of the contribution if monetary, and the date of the contribution, together with the name of the individual paid solicitor who solicited the contribution.

(2) Any person involved in solicitations WHO CLAIMS AN EXEMPTION FROM THE DEFINITION OF PAID SOLICITOR IN SECTION 6-16-103(7) shall maintain records of ruling letters and other communications from the internal revenue service regarding tax-exempt status. Failure to produce such records on written demand of [a peace officer] THE DISTRICT ATTORNEY pursuant to section 6-16-111(1)(e) shall give rise to a rebuttable presumption that the person does not have a ruling letter granting tax-exempt status pursuant to 26 U.S.C. sec. 501(c)(3).

(3) Each MONETARY contribution in the custody of a paid solicitor shall be deposited in an account at a bank or other federally insured financial institution in its entirety and within [five] TEN days after its receipt.

SECTION 7. 6-16-111(1)(a) and (1)(e), Colorado Revised Statutes, as amended, are amended to read:

6-16-111. *Violations.* (1)(a) Knowingly solicits any contribution and in the course of such solicitation knowingly performs any act or omission in violation of any of the provisions of section 6-16-104 to [6-16-108] 6-16-107 and 6-16-110;

(e) Knowingly fails to create and maintain all records required by section 6-16-109 to be created and maintained

or knowingly fails to make available said records for examination and photocopying at the office of [a peace officer as defined in section 18-1-901 (3) (l), C.R.S.,] THE DISTRICT ATTORNEY or at his own office IN THIS STATE with copying facilities furnished free of charge, within five days after a written demand for the production of said records by [a peace officer] THE DISTRICT ATTORNEY, OR WITHIN TWENTY DAYS WITH RESPECT TO RECORDS KEPT OUT OF STATE;

SECTION 8. *Repeal.* 6-16-103 (6) and (9), 6-16-104 (5) and (6), and 6-16-108, Colorado Revised Statutes, as amended, are repealed.

Section 9. *Appropriation.* In addition to any other appropriation, there is hereby appropriated, out of the department of state cash fund, to the department of state, for the fiscal year beginning July 1, 1989, the sum of thirty-one thousand two hundred thirty dollars ($31,230) and 1.0 FTE, or so much thereof as may be necessary, for the implementation of this act.

SECTION 10. *Effective date—applicability.* This act shall take effect July 1, 1989, and shall apply to offenses committed on or after said date.

SECTION 11. *Safety clause.* The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

[Signatures Omitted]

92-217

No. _____

FILED
OCT 19 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

AMERICAN COUNCIL OF THE BLIND, INC., a Colorado non-profit corporation; ROCKY MOUNTAIN FEDERATION OF HANDICAPPED ATHLETES, a division of Pegasus Foundation, Inc., a Colorado non-profit corporation,

Petitioners,

vs.

ROY ROMER, Governor, State of Colorado; DUANE WOODARD, Attorney General, State of Colorado; NORMAN S. EARLY, JR., District Attorney for the Second Judicial District, State of Colorado,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. _____

IN THE
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vs.

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Respondents.

Petition for Writ of Certiorari to the
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RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 962 F.2d 1501 (10th Cir. 1992).

STATEMENT OF THE CASE

That appeal arose from the denial of the petitioner's

motion for attorney fees pursuant to 42 U.S.C. §1988. On June 29, 1988, 2 days before the Colorado Charitable Solicitations Act was to become effective, and the very day that this Courtreported its decision in *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), the petitioners filed a suit challenging the constitutionality of the Act, which was joined with two other lawsuits, including one filed by the attorney for the plaintiff in *Riley*, raising claims similar to those he successfully pursued in that case.

Preliminary matters were resolved by stipulation when the respondents immediately notified the petitioners that they had no intention of enforcing the new Act, and the lawsuits were held essentially in abeyance until their merits could be resolved by new legislation enacted on June 5, 1989, which was written and pressed by the respondents after consultation in varying degrees with the three sets of plaintiffs. The plaintiff in one of the other lawsuits agreed not to seek attorney fees, calculating that the minimal claim involved was more valuable in exchange for amendments that it wanted in the new statute. The plaintiff represented by the attorney in *Riley*, stipulated to a fee award of $12,500. The petitioners in this lawsuit went to hearing on their claim for $80,000 on the primary case, with an additional claim for $50,000 incurred in establishing their right to a fee award.

After the hearing, at which the presidents of the two plaintiff charities testified as witnesses for the respondents, the magistrate found that the petitioners were not prevailing parties for purposes of a fee award and therefore did not reach the question of "special circumstances," despite noting that the petitioners' conduct was aggravated by an excessive request for fees. Because of the way in which the charities had been recruited by the telemarketer client of the "plaintiffs'" attorneys,

the control over the lawsuit exercised by the telemarketer throughout, and particularly the severing (almost immediately after the suit began) of the relationships between the charities, who were the named plaintiffs, and the telemarketer, who paid the attorneys, the magistrate also concluded that the counsel lacked standing to pursue a §1988 fee award, which belonged to the charities, and that the conduct of the petitioners' counsel involved a number of ethical violations.

The recommendation was initially adopted in its entirety by the district court but in response to a motion to reconsider, it indicated that it expressed no opinion as to the ethics of the counsels' conduct. Treating the "standing" issue merely as a question whether a fee award could be proper when fees are paid by a third party, the Tenth Circuit disagreed on that point, but upheld the determination that the petitioners were not prevailing parties.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Questions Presented in the petition are not raised by the record because they ignore the factual determination of the district court that *these* petitioners did not "achieve" or "obtain" the relief they sought.

Contrary to the suggestion of the petition's first reason for granting the writ, the lower courts in this case did not misapprehend or misapply this Court's definition of "a significant issue" in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989). In *Garland*, since the plaintiff actually won a summary judgment on a point at issue, the court was not concerned with whether it *succeeded* on the issue, but only whether the issue on which it succeeded

was sufficiently *significant* to warrant a fee award. Unlike *Garland*, however, these petitioners received no judicial determination in their favor, either preliminary or permanent, and therefore they could be entitled to a fee award only if they first met the catalyst test by showing that the efforts of their attorneys were a necessary and substantial factor in achieving a change that was required by law. *See Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978).

This calculus was further complicated in this case by the fact that the statute was challenged by plaintiffs in two other lawsuits, raising different claims for relief and seeking changes that would particularly benefit them, and by the fact that before the statute even came into effect, the respondents were waiting on cases in this Court and the Colorado Supreme Court and never intended to enforce the statute until those courts had spoken, a fact which the magistrate found was made clear to the petitioners. In order to be entitled to a fee award according to these tests, therefore, the efforts of petitioners' counsel, as distinguished from other lawsuits or other factors, had be a necessary and substantial factor in achieving changes in the relationship between the petitioners and the respondents that were both required as a matter of law and not technical or *de minimis*.

The causation question, whether the plaintiffs' counsel were a substantial and necessary factor in achieving particular results, is primarily a factual determination to be upheld unless it is "clearly erroneous." The district court made factual findings that were upheld as not clearly erroneous that the catalyst for the amendments concerning required disclosures by solicitors was the new caselaw and the hard fought efforts of other attorneys for other plaintiffs who, unlike the petitioners, had specifically pursued the first amendment theory that succeeded

in *Riley*. With regard to the other statutory amendments, the court also made various findings not only about necessary and substantial causation, but also about the significance of the amendments, in both the general sense of being legally required and the more specific *Garland* sense of not being technical or *de minimis*. It found no change in which these petitioners met all three tests.

Rather than misapprehending the *Garland* test for significance or reverting to the "central issue" test, the lower courts in this case were concerned with the role played by the attorneys for *these* plaintiffs with regard to specific changes. In those few instances where these attorneys might be said to have had some catalytic effect, such as lengthening from 60 to 90 days the time for paid solicitors to make reports, reducing record retention requirements form 3 to 2 years, and permitting paid solicitors to produce their records upon request rather than maintaining them in state, those courts did not err in finding them insignificant since they were not even legally required. A number of amendments were made in the spirit of cooperation and compromise and simply because they were requested by the petitioners and had no practical consequence for the respondents. While particular lines may eventually have to be drawn with regard to the meaning of "technical or *de minimis*" for purposes of a plaintiff's fee award, it would be inappropriate and unnecessary to do so in a case in which the petitioners have failed to achieve anything that is even legally required, such that they could pass the catalytic effect test.

2. **There is no split in jurisdictions about the relative burdens involved in meeting the catalyst test for §1988 attorney fee awards, and if there were, the issue is not raised by the record in this case because no burden was**

placed on the petitioners below.

The petition's second reason for granting the writ suggests that there is a split among the jurisdictions with regard to the placement of the burden to establish the causal element of the catalytic effect test, which controls when a plaintiff has not received any favorable judicial determination in his lawsuit. Such a split is not demonstrated by the two cases cited in the petition, both of which purport only to give particular instructions on remand for resolution of questions raised in particular factual contexts. In any event, however, the petitioners never raised any question about the test for establishing a catalytic effect below, and neither the findings of the district court nor the rulings of the appellate court depended upon a failure of the petitioners to meet any burden in establishing causation.

As the two-prong test of *Nadeau* was set out by the magistrate, it was burden neutral, and the magistrate's factual findings concluded that these petitioners were not the cause of any significant change - not merely that the cause was insufficiently established. Unlike the two cases cited in the petition, the determination of causation was not based on an assertion of the respondents as to their motive but upon evidence of the existence and timing of other lawsuits, caselaw, and negotiations with other parties, all of which was equally available to the petitioners. Despite the efforts of the petitioners to find a controversy over a legal standard which might be grounds for granting certiorari, the determination below was a factual one and neither the record nor the opinion involves any legitimate dispute of law.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 92-217

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN COUNCIL OF THE BLIND OF COLORADO, INC., a Colorado non-profit corporation; ROCKY MOUNTAIN FEDERATION OF HANDICAPPED ATHLETES, a division of Pegasus Foundation, Inc., a Colorado non-profit corporation,

Petitioners,

v.

ROY ROMER, Governor, State of Colorado; DUANE WOODARD, Attorney General, State of Colorado; NORM S. EARLY, JR., District Attorney for the Second Judicial District, State of Colorado,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. *DE MINIMIS* TEST

The respondents concede that "particular lines may eventually have to be drawn with regard to the meaning of 'technical or *de minimis*' for purposes of a plaintiff's fee award . . . ." Br. Opp. 5 (quoting *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792 (1989)). They recognize, in other words, the significance of the issue underlying the first question presented by the petition.

The respondents go on to assert, however, that "it would be inappropriate and unnecessary" to consider the issue "in a case in which the petitioners have failed to achieve anything that is even legally required, such that they could pass the catalytic effect test." Br. Opp. 5. The posited reason is unfounded, and does not obstruct review.

First, the court below expressly refrained from ruling on the "required by law" element. *See* Pet. App. 9a, 962 F.2d 1501, 1505. Indeed, the court treated each of the statutory changes under the *Garland* "de minimis" rubric, with the exception of one, which it held to be "directly caused and mandated by the *Riley* case," Pet. App. 10a-12a, 962 F.2d at 1506-07 (citing *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988))—in other words, that it *was* "legally required."

In any event, the phrase "required by law" is a term of art with particular meaning in the section 1988 context—a meaning concededly satisfied in this case. A defendant's conduct is "required by law" if it is " 'not a wholly gratuitous response to an action that in itself was frivolous or groundless.' " *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1475 (10th Cir. 1985) (quoting *Williams v. Leatherbury*, 672 F.2d 549, 551 (5th Cir. 1982)); *accord*, *Collins v. Romer*, 962 F.2d 1508, 1513-14 (10th Cir. 1992).[1] The respondents conceded in the dis-

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[1] The leading case, relied upon in *Garland* on another point, is *Nadeau* v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978), under which the test is whether the action "could be considered 'frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so,' " *id.* at 281. It could not be otherwise, since "[n]othing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the merits or on a judicial declaration that the plaintiffs' rights have been violated." *Maher v. Gagne*, 448 U.S. 122, 129 (1980). To require litigation of the merits of a mooted case on a motion for attorney's fees would turn that motion into just the "second major litigation" it ought not be. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). *See also, e.g.*, *Koster v. Perales*, 903 F.2d 131, 136 (2d Cir. 1990); *Ortiz de Arroyo v.*

trict court that the action met this test, that it was in no way "frivolous." Knaizer Depo. 55.

The petition, therefore, squarely poses the significant issue of the application of the "de minimis" test—an aspect of which is now under review in *Farrar v. Hobby*, No. 91-990 (U.S. argued Oct. 7, 1992)—in the context of an equitable action mooted by the defendants' unilateral conduct. Review is especially called for here, where the mooting event was the enactment of amendments that specifically addressed each of the several statutory provisions that the petitioners had challenged.

II. *BURDEN OF PROOF*

Respondents' dismissal of the disharmony of the opinion below with decisions of other circuits on the question of burden of proof is unsupported. Here as well, the respondents do not contend that the issue is not important, but assert instead that the First and Second Circuit cases cited in the petition embody no proposition of law, that petitioners did not raise the issue below, and that it is irrelevant to this case. *See* Br. Opp. 6. None of these positions survives inspection.

The respondents say first that the "two cases cited in the petition . . . purport only to give particular instructions on remand for resolution of the questions raised in particular factual contexts." Br. Opp. 6. All legal issues, of course, arise "in particular factual contexts." Here, the "instructions . . . for resolution of questions" are nothing more or less than rules of law. Thus: "*Where, as here*, plaintiffs' lawsuit is mooted by corrective action, the burden properly shifts to defendants to establish the absence of a causal connection in order to defeat a claim for legal fees." *Koppel v. Wien*, 743 F.2d 129, 135 (2d

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Romero Barcelo, 765 F.2d 275, 283 (1st Cir. 1985); *Illinois Welfare Rights Org. v. Miller*, 723 F.2d 564, 566 (7th Cir. 1983); *Miller v. Staats*, 706 F.2d 336, 441 n.31 (D.C. Cir. 1983).

Cir. 1984) (emphasis added). And: Unless the government can "demonstrate[] . . . in a concrete manner" that "the complainant's success in obtaining the documents was due more to its responsible compliance with the provisions of the Act than to the complainant's pending suit," then "*a court would have to conclude* that the complainant had 'substantially prevailed' within the meaning of [FOIA]." *Crooker v. United States Dep't of Justice*, 632 F.2d 916, 919 (1st Cir. 1980) (emphasis added).

Next, it is claimed that "the petitioners never raised any question about the test for establishing a catalytic effect below." Br Opp. 6. On the contrary, petitioners raised this same point, citing the same cases, in both the district court, *see* 2 Applt. App. 287 n.3,[2] and the court of appeals, *see* Applt. Br. 24 n.11.[3]

Finally, the respondents say that the allocation of the burden made no difference. *See* Br. Opp. 6. The point cannot be credited in light of the overwhelming prima facie case of causation the petitioners made, including the statutory changes tailored to petitioners' complaint and the explicit statements in the legislative history. *See* Pet. 10-17. The "other lawsuits" and "other parties" referred to by the respondents concerned different sets of issues, and the fact that the petitioners assertedly had "caselaw" supporting them, *see* Br. Opp. 6, hardly discounts petitioners as the prevailing parties. There is no reason to suspect, in sum, that the allocation of the burden would not have affected the outcome.

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[2] "Applt. App." refers to the two-volume Appellants' Appendix filed in the court of appeals.

[3] "Applt. Br." refers to the Brief of the Appellants filed in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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